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No. 95-326

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

J & T COAL, INCORPORATED,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. WHETHER CRIMINAL FINES ASSESSED AGAINST J&T COAL VIOLATED J&T'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY WHERE PRIOR "CIVIL" FINES HAD IMPOSED PUNISHMENT UPON J&T ARISING FROM THE SAME OFFENSE AND CONDUCT.

A. WHETHER THE CONCEPT OF "PUNISHMENT" AS STATED IN AUSTIN v. UNITED STATES, 125 L. Ed. 2d 488 (1993), IS APPLICABLE IN THE DOUBLE JEOPARDY CONTEXT? (The Fourth Circuit Ruled, "No.")

B. WHETHER A "CIVIL" FINE MORE THAN $130,000 IN EXCESS OF THE GOVERNMENT'S SWORN REMEDIAL COSTS OF $163,729 CONSTITUTES "PUNISHMENT?" (The Fourth Circuit Ruled, "No.")

C. WHETHER THE STATUTORY ELEMENTS, OR BLOCKBURGER v. UNITED STATES, 284 U.S. 299 (1932), TEST IS SATISFIED WHERE A DEFENDANT IS SUCCESSIVELY PROSECUTED FOR VIOLATING TWO SECTIONS OF THE SAME STATUTE, ONE OF WHICH PROHIBITS VIOLATION OF REGULATIONS AND THE SECOND OF WHICH PROHIBITS "WILLFUL"

VIOLATION OF THE SAME REGULATIONS? (The Fourth Circuit Found These Were Separate Offenses.)

II. WHETHER J&T IS ENTITLED TO A RESENTENCING BASED UPON THE COURT'S FAILURE TO RESOLVE CONTROVERTED FACTS REGARDING ITS ABILITY TO PAY A FINE OR TO DETERMINE ITS RELATIONSHIP TO A SECOND CORPORATION?

A. WHETHER THE DECISIONS BELOW CLEARLY VIOLATE FED. R. CRIM. P. 32, 18 U.S.C. §§ 3572 AND 3553, AND THE SENTENCING GUIDELINES IN IMPOSING A FINE WITHOUT CLEARLY RESOLVING MATERIAL DISPUTED FACTS? (The Fourth Circuit Found it too "Cumbersome" to Require a Finding on the Corporate Relationship Issue, and Excused the Absence of Factual Findings.)

B. WHETHER IT IS AN AFFRONT TO DUE PROCESS AND THE PRECEDENT OF THIS COURT FOR J&T'S FINE TO BE BASED ON THE ASSETS OF JAD, AN UNINDICTED, UNCHARGED CORPORATION WHICH HAS NOT BEEN ADJUDICATED J&T'S ALTER EGO? (The Fourth Circuit Held the Trial Court's Reliance on JAD's Resources in Fixing J&T's Fine was Wholly Appropriate.)

III. WHETHER THE COURTS ERRED IN REFUSING TO GROUP J&T'S OFFENSES WHICH INVOLVED THE SAME INCIDENT AND VICTIMS, AND, GIVEN THE DECISION NOT TO GROUP, FURTHER ERRED IN ASSESSING AN INAPPROPRIATE INCREASE IN OFFENSE LEVEL IN CONTRAVENTION OF SENTENCING GUIDELINE § 3D1.4? (The Fourth Circuit Upheld the Sentencing Court's Grouping Determination in all Respects.)

LIST OF ALL PARTIES

The parties to this case are the United States of America and J&T Coal, Inc. ("J&T"), a Virginia Corporation. J&T filed Chapter 7 Bankruptcy on May 7, 1993, and has no parent companies of subsidiaries. The prosecution alleged below that J&T was the alter ego of a second corporation, JAD Coal Co., Inc. ("JAD"). No such finding was made below, however, and JAD has never been before the courts in this action.

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REPORTS OF OPINIONS BELOW

The decision of the United States District Court for the Western District of Virginia denying J&T's motion to dismiss on Double Jeopardy grounds is published at 818 F. Supp. 925 (W.D. Va. 1993) and appears in the Appendix at pp. 15-22. The trial court's sentencing of J&T was done orally and by unpublished Order, which appears in the Appendix at pp. 29-39. The trial court's unpublished grouping decision appears in the Appendix at pp. 23-28. The unpublished decision of the United States Court of Appeals for the Fourth Circuit is contained in the Appendix at pp. 1-14.

GROUNDS FOR JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Fourth Circuit issued May 30, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The relevant Constitutional provisions, statutes, Rules, and regulations are voluminous. Accordingly, pursuant to Rule 14.1(k) of the Rules of the Supreme Court, these provisions are set out in the Appendix to this Petition. The following is a listing of the provisions memorialized:

Amendment 5, U.S. Constitution at Appendix p. 53.

Rule 32(c)(3)(D), Federal Rules of Crim. Proc. at Appendix p. 54.

30 U.S.C. §§ 820(a) and (d) (1990) at Appendix p. 55.

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STATEMENT OF THE CASE

1. On February 13, 1991, a roof fall occurred in J&T's Mine #1 which resulted in the death of four miners. The Mine Safety and Health Administration (MSHA) assessed approximately $300,000 in "civil" penalties against J&T under 30 U.S.C. § 820(a) for violations of various regulations codified in the Code of Federal Regulations (CFR), Title 30. (App. 55-57.) On July 20, 1992, a "civil" complaint was filed in Federal District Court to obtain judgment against J&T for the fines assessed by MSHA.

2. The government provided evidence that it incurred costs in excess of $163,000 arising from the incident. (App. 50-51.) Over J&T's objection, the "civil" fines of approximately $300,000 were imposed. When J&T made clear to the

prosecution that it could not pay fines well in excess of $300,000 (including interest) in a lump sum, the government responded by filing an Application for Writ of Continuing Garnishment in April, 1993, and by seizing all of J&T's holdings. (JA 225-26, 273.)[1] The seized holdings had a value of approximately $90,000. (JA 233.) J&T had continued in operation until the government's levy. (JA 269.) It then filed for bankruptcy under Chapter 7 of the Bankruptcy Code. (JA 225.)

3. On December 16, 1992, a criminal indictment was returned against J&T arising out of the same roof fall of February 13, 1991, and alleging willful violations of the very same safety standards that formed the basis of the prior, "civil" assessments. (App. 16, 40-48.) J&T filed a motion to dismiss the indictment (JA 28) which alleged violations of 30 U.S.C. § 820(d) and 30 C.F.R. §§ 75.202(a)-(b), 75.203(a)-(b), 75.220(a)(1), and 75.1200-2(b), (App. 56-57). It argued that the government had previously assessed penalties against J&T (under 30 U.S.C. § 820(a)) for violation of the same regulations and that pursuit of the criminal penalties violated the Double Jeopardy Clause. The trial court rejected J&T's Motion and filed a written opinion on the Double Jeopardy issue. (App. 15-22.)[2]

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[1]Reference to the Joint Appendix in the Court of Appeals for the Fourth Circuit will be by "JA ___." Reference to the Appendix to this Petition will be by "App. ___."

[2]The United States District Court for the Western District of Virginia had jurisdiction of this criminal action by virtue of 18 U.S.C. Section 3231, as it involved violations of 30 U.S.C. § 820 and related mining regulations. The basis for appellate jurisdiction in the Fourth Circuit was founded upon 18 U.S.C. Section 3742 and 28 U.S.C.

(continued...)

4. The ensuing criminal trial resulted in conviction of J&T, and the Court imposed a criminal fine of $1.4 million. (App. 33.)[3] The court credited the previously assessed $321,287 debt from the "civil" fines against this figure, so that the total assessment for the "civil" and criminal proceedings was $1.4 million. (App. 33.)

5. In the course of J&T's sentencing hearing, the trial court admitted extensive evidence relating to the finances of a second corporation, JAD Coal Co., Inc. ("JAD"), in which J&T's two principal owners, Aubra Dean ("Dean") and Carl McAfee ("McAfee"), possessed holdings. (JA 397.) The Court assessed fines without regard to J&T's inability to pay them. The Court considered the assets of JAD in fixing J&T's fine, while stating that it was not piercing the corporate veil. (App. 29, 33.)

6. J&T raised numerous objections to the presentence report. (JA 405-407.) The trial court failed to make findings pursuant to Fed. R. Crim. P. 32 with respect to these objections. These objections involved various matters including the presentence report's allegations of intertwined

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[2](...continued)
Section 1291, in that J&T appealed its fine alleging that it was imposed in violation of law and as a result of an incorrect application of the Sentencing Guidelines.

[3]The court reached this figure by multiplying $500,000, the "corporate" fine amount for a level 19 offense under § 8C2.4 of the 1992 Sentencing Guidelines, by the maximum available multiplier of 2.8 under the court's calculations pursuant to § 8C2.6. Because the offenses here at issue failed to fall into any clear guideline category, the court analogized them to Involuntary Manslaughter, a level fourteen base level under § 2A1.4. (JA 116-17.) Five levels were added to J&T's base level under § 3D1.4 of the Guidelines. (JA 121.)

corporate identity between JAD and J&T, and J&T's alleged ability to pay fines.

7. The Fourth Circuit Court of Appeals rejected J&T's appeal on all fronts. With respect to the Double Jeopardy issue it held:

(a) Austin v. United States, ___ U.S. ___, 125 L. Ed. 2d 488 (1993) is an Eighth Amendment Excessive Fines Clause case which has no application to the Double Jeopardy context (App. 6),

(b) the language in United States v. Halper, that in "the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the government whole" 490 U.S. at 449, applies to non-fixed penalty cases and justifies a "civil" fine of over $300,000 even when the government's remedial costs of $163,000 are known, (App. 7) and

(c) that Blockburger v. United States, 284 U.S. 299 (1932), the standard for determining whether two prosecutions are "one" for purposes of Double Jeopardy, presents no hindrance to successive prosecutions under two statutes which are virtually identical except that the second statute contains a willfulness requirement absent in the first statute. (App. 5-6.)

8. The appellate court ignored the absence of trial court findings of fact under Rule 32 and 18 U.S.C. §§ 3572 and 3553 on the controverted issues of J&T's ability to pay a fine and its relationship with a second corporate entity, JAD. The Fourth Circuit held that it was entirely appropriate for the trial court to consider the funds of JAD, an unindicted, uncharged entity not before the Court, in fixing

J&T's criminal fine. (App 13.) It made this ruling despite the fact that there has never been a finding that JAD and J&T are alter egos or that either entity possessed adequate funds to pay a $1.4 million criminal fine.

9. The Fourth Circuit upheld the district court's conclusion that it was too "cumbersome" to require the court to resolve the corporate veil issue at sentencing (App. 13) and left this disputed factual issue unanswered. The court also upheld, in all respects, the trial court's grouping determinations.

REASONS FOR GRANTING THE WRIT

1. This Petition involves a Double Jeopardy claim on which the Circuits are plainly split, infra at 13-14, and a decision below which misconstrues, ignores and disavows precedents of this Court. This Petition should be granted to establish and reaffirm that:

- the concept of "punishment" as stated in Austin v. United States, ___ U.S. ___, 125 L. Ed. 2d 488 (1993), is applicable in the Double Jeopardy context (infra at 10-14);

- under United States v. Halper, 490 U.S. 435, 448 (1989), and Austin, supra, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment...", such that a "civil" fine including a punitive sting of more than $130,000 in excess of the government's established remedial costs constitutes "punishment" (infra at 10-16); and

- the statutory elements, or Blockburger,[4] test will not permit a defendant to be successively prosecuted for violating two sections of a statute, one of which prohibits violation of mining regulations and the other which bars "willful" violation of the same regulations arising out of the same incident. (Infra at 16-20.)

This case provides an effective vehicle for addressing and resolving each of these important Double Jeopardy issues.

2. The Fourth Circuit below flatly found Austin inapplicable; extended Blockburger beyond its rational breaking point; and dismissed Halper as an aberration. The decision below creates flawed and dangerous precedent. After the largest "civil" MSHA fines in the history of the Western District of Virginia were imposed (JA 299) (including a punitive fine well in excess of the government's stated remedial costs), the Fourth Circuit stood by as a second "criminal" proceeding prosecuted J&T for "willful" violation of the very same MSHA regulations previously adjudicated in the civil trial. This second proceeding netted a $1.4 million fine for the same offense already prosecuted. This case cries out for review.

3. This Petition also presents the question of whether lower courts must make specific factual findings under Fed. R. Crim. Proc. 32, 18 U.S.C. § 3572, and related statutes, or whether such mandatory directives can be relaxed where imposition of criminal fines is involved. While cases vary greatly on the adequacy of sentencing findings, depending on the facts of each case, there is a broad split among the circuits on what constitutes acceptable "findings" with respect

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[4]Blockburger v. United States, 284 U.S. 299 (1932).

to determinations of a defendant's ability to pay a fine. Infra at 23-24 and n.8.

4. Here, Rule 32(c)(3)(D) was plainly violated in a material manner. J&T objected to presentence report statements regarding its ability to pay a fine and its alleged intertwined relationship with JAD. The absence of court findings on these controverted issues very much prejudiced J&T. If the court had appropriately addressed J&T's objections, it could not have imposed a $1.4 million fine. The absence of these mandatory findings requires a remand. Infra at 20-25. Similarly, the court's handling of the grouping issue resulted in a vastly increased, and unjust, fine. Infra at 28-29.

5. The fact-finding issue also calls into question the propriety of assessing a corporate fine against one entity, J&T, that is based on the assets of a second -- uncharged -- entity. Infra at 25-28. It defies fundamental concepts of fairness and due process for the trial court to assess J&T's fine based on JAD's assets where the court specifically has declined to pierce the corporate veil. (App. 29, 33.) Nothing in the sentencing guidelines permits such a manipulation of distinct corporate holdings. The Fourth Circuit's conclusion that it is too "cumbersome" to require the trial court to address at sentencing the factual dispute as to interconnection between J&T and JAD runs headlong into the precedent of this Court. Zenith Radio Corp. v. Hazletine, 395 U.S. 100 (1969). Infra at 26. Even the prosecution argued at sentencing that the veil must be pierced before an uncharged, unindicted entity's financial records became relevant to J&T's fines. (JA 305, 308-14, 322.)

6. The Fourth Circuit's imposition of huge fines without regard to corporate formalities or responsibility

presents a dangerous precedent -- a precedent which this Court should not let stand.

I. WHETHER CRIMINAL FINES ASSESSED AGAINST J&T COAL VIOLATED J&T'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY WHERE PRIOR "CIVIL" FINES HAD IMPOSED PUNISHMENT UPON J&T FOR THE SAME OFFENSE AND CONDUCT?

The Fifth Amendment provides that "No person shall...be subject for the same offense to be twice put in jeopardy of life or limb..." U.S. Const., Amend. 5. The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. Department of Revenue of Montana v. Kurth Ranch, ___ U.S. ___, 128 L. Ed. 2d 767 (1994). Although its text mentions only harms to "life or limb", it is well settled that the protection offered by the Double Jeopardy Clause also applies to imprisonment and monetary penalties. Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873); United States v. Halper, 490 U.S. 435 (1989).

Here, the serious fines imposed upon J&T involved separate and successive proceedings which punished J&T for the same offense twice. The civil fines were already in place when the later, criminal fines were imposed. Thus, the guarantee against Double Jeopardy proscribes this second wave of fines where (1) the "civil" fines inflicted "punishment" upon J&T within the meaning of controlling precedents, and where (2) violation of the same mining regulations comprised the basis of the initial and subsequent punitive fines.

A. The Lower Courts Failed to Recognize that a "Civil" Sanction that is not Solely Remedial, but also Serves Deterrent or Punitive Functions is "Punishment" for Purposes of Double Jeopardy Analysis. This Ruling Widens a Split in the Circuits and Runs Directly Contrary to the Precedent of this Court.

In its recent decisions in Austin v. United States, ___ U.S. ___, 125 L. Ed. 2d 488 (1993); Halper, 490 U.S. 435 (1989); International Union, United Mine Workers v. Bagwell, ___ U.S. ___, 129 L. Ed. 642 (1994); Kurth Ranch, ___, U.S. ___, 128 L. Ed. 2d 767 (1994), this Court has gone far in explaining that fines with a "civil" moniker nevertheless frequently impose punitive sanctions. When the "civil" sanction is, in fact, punitive in nature, a subsequent criminal or punitive prosecution for the same offense is barred. Kurth Ranch, supra; Halper, supra.

Notably, here, the district court repeatedly relied upon the test enunciated in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) to determine the "civil" versus punitive aspects of the initial "civil" fine. (App. 17-19.) This Court, however, admonished in Austin, that:

> [T]he United States' reliance on Kennedy v. Mendoza-Martinez and United States v. Ward is misplaced. The question in those cases was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required. See Mendoza-Martinez, 372 US at 167, 184, 9 L Ed 2d 644, 83 S Ct 554; Ward, 448 US at 248, 65 L Ed 2d 742, 100 S Ct 2636. In addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in Mendoza-

> Martinez and Ward. See. e.g., United States v. Halper, 490 US 435, 447, 104 L Ed 2d 487, 109 S Ct 1892 (1989).

125 L. Ed. 2d at 498, n.6. (Emphasis added.)

As recent decisions of this Court make clear, the correct test for determining whether a sanction is punitive is not whether it is deemed "civil" or "criminal". This is true, as the Court observed in Halper, because:

> It is commonly understood that civil proceedings may advance punitive as well as remedial goals...The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads.

Halper, 490 U.S. at 447-48. The Halper Court went on to state:

> [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

490 U.S. at 448. While some explained Halper as a limited holding based on peculiar facts, its critical language was reiterated in Austin. This Court made clear in Austin that it meant what it had said in Halper when admonishing that any civil sanction which does not solely serve a remedial purpose is "punishment." 125 L. Ed. 2d at 498.

Other Circuits have embraced this reading of Halper, Austin, and Kurth Ranch in a Double Jeopardy context. See United States v. Hudson, 14 F.3d 536, 540 (10th Cir. 1994) ("Appellants contend that the above quoted language means that unless a sanction is 'solely' remedial, i.e., not serving deterrent or retributive ends, it is punishment. This position is confirmed by the recent Supreme Court decision in Austin v. United States"); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (1994), reh'g denied, 56 F.3d 41 (9th Cir. 1995) (civil forfeiture action deemed Double Jeopardy violation following criminal conviction for the same offense). The Fourth Circuit flatly rejected any suggestion that Austin has application outside the Eighth Amendment realm:

> J&T seeks solace from certain language in Austin v. United States, ___ U.S. ___, 113 S. Ct. 2801 (1992), but Austin is an Eighth Amendment Excessive Fines clause case involving a forfeiture of a home and business under 21 U.S.C. §§ 881(a)(4) and (a)(7) by way of summary judgment after the owner had entered a plea of guilty to possession of cocaine with intent to distribute. We find it inapplicable to the present facts.

(App. 6.) This same sentiment was recently expressed in an acrimonious Ninth Circuit dissent in $405,089.23 U.S. Currency, 56 F.3d at 42-43 (dissenting denial of rehearing).

Here, the Fourth Circuit brazenly dismissed the Halper, Austin, and Kurth Ranch holdings that civil sanctions which do not solely serve remedial purposes are punishments. There is no denying that the so-called "civil" fine imposed against J&T included a punitive component many thousands

of dollars in excess of the sum necessary to make the government whole.

The heaviest "civil" fines ever imposed for MSHA violations in the Western District of Virginia were assessed against J&T as a result of the roof fall incident of February 13, 1991. (JA 299.) The government indicated by affidavit that it expended $163,729 in investigating the accident and in prosecuting J&T. (App. 50-51.) Yet the "civil" fines imposed below for this incident included a punitive sting which exceeded the government's expenditures by well in excess of one hundred thousand dollars.

Indeed, when viewed in the context of this case, the punitive aspects of this particular proceeding become readily apparent. When J&T offered to attempt to pay its debt of over $300,000 in installments, the prosecution's response was to issue an Application for Writ of Continuing Garnishment against J&T and to seize all J&T accounts. (JA 225-26, 273.)

The prosecution, nevertheless, proceeded with criminal charges arising from the same roof fall for an additional fine up to $1.4 million. When the maximum fine of $1.4 million was imposed, the court credited the previous outstanding $321,287 judgment from the "civil" fine against the new "criminal" fine so that the sanction did not exceed $1.4 million. (App. 33, 37.)

The Fourth Circuit's holding that a "civil" fine under this setting is not "punishment," runs contrary to clearly established precedent of this Court. While the prosecution may attempt to glean support from decisions such as U.S. v. WRW Corp., 986 F.2d 138 (6th Cir. 1993), U.S. v. Tilley, 18 F.3d 295 (5th Cir.), cert. denied, 130 L. Ed. 2d 490 (1994) and the blistering dissent in $405,089.23 U.S. Currency, 56

F.3d at 42-43, the prosecution's position -- and the Fourth Circuit's holding -- run directly contrary to the decisions of the Tenth Circuit in Hudson, 14 F.3d at 540, the Ninth Circuit in $405,089.23 U.S. Currency, 33 F.3d at 1219, and the Seventh Circuit in United States v. Torres, 28 F.3d 1463 (7th Cir. 1994), cert. denied, 130 L. Ed. 2d 603 (1994), (finding no double jeopardy violation under the facts of that case). This important question, on which the Circuits are split, merits review by this Court.

B. The Fourth Circuit Misapplied the Precedent of this Court by Holding that a Fine Doubling the Government's Known Remedial Expenses Cannot be Punishment under Halper.

While intentionally sidestepping the central test stated in Halper, 490 U.S. at 448, the prosecution and lower courts wholeheartedly embraced the statement in that case that "fixed-penalty-plus-double damages provisions" are remedial, 109 S. Ct. at 1902. The courts cited United States v. WRW Corp., 986 F.2d 138 (6th Cir. 1993) as support. Again, such claims miss the mark. As WRW, which also involved fines for mining violations, quickly points out, "in this case there is no fixed penalty provision to review" as there was in Halper, 986 F.2d at 140. The same is true here. The inquiry in the case at bar is not whether a set "fixed penalty" reasonably correlates to remedial purposes, but whether the initial "civil" sanctions imposed against J&T and tailored to the facts of this case can safely be said to be solely remedial. Austin, 125 L. Ed. 2d at 498. As the Ninth Circuit observed, after Austin:

> [A] sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial

> purpose. See Austin v. United States, ___ U.S. ___, ___, ___ 113 S. Ct. 2801, 2806, 2812, 125 L. Ed. 2d 488 (1993).

United States v. $405,089.23 U.S. Currency, 33 F.3d 1210, 1219 (9th Cir. 1994).

Here, the government revealed that it spent approximately $163,000 as a result of the incident. The fine imposed was monumentally higher. The fine bankrupted J&T and the prosecution has garnished J&T's assets. The "civil" fine cannot be said to solely serve remedial purposes. Indeed, the trial court "credited" the sum of $321,216.80, the "civil" sanction due at sentencing (App. 33), against the criminal fine of $1.4 million, so that the total sanction for the two proceedings was $1.4 million.

Notably, the Sixth Circuit in WRW observed that the double jeopardy claim presented a "close call," 986 F.2d at 140, and that the defendants never suggested that the initial "civil" fine of $90,000 was excessive in relation to the government's expenses. 986 F.2d at 142. Indeed, because this was so, the government was not called upon to establish its related expenses in WRW. That cannot be said here; the prosecution established its expenses in this case and, nevertheless, sought well in excess of one hundred thousand dollars in "smart" money on top of that remedial amount.

The prosecution's resort to the Halper "fixed-penalty-times-two" paradigm here reveals the depth of the confusion in this area of law. In Halper, a case involving a small gauge multiple offender, the disputed language was discussing the circumstances in which "fixed-penalty-plus-double-damages provisions can be said to do no more than make the government whole." 490 U.S. at 449. The point is, where a

fixed fine is at work some approximation of remedial costs must be undertaken. Here there is no need to guess at the government's remedial costs. We know what they are -- because the government filed an affidavit swearing to them. (App. 50-51.) And we know the lower court imposed fines more than $130,000 in excess of those remedial costs. That additional sting makes clear that the "civil" fines which brought J&T to its knees were not solely remedial, but contained a strong dose of punishment. Subsequent criminal prosecution for the same offense, accordingly, runs afoul of the Fifth Amendment.

C. The Fourth Circuit's Interpretation of the Blockburger Test Would Render Double Jeopardy Meaningless and Runs Counter to the Precedent of this Court.

Nor should there be any question concerning whether the second prosecution -- involving the criminal fine -- arose from the same "offense" as the previous "civil" prosecution. Obviously, J&T's acts underlying the roof fall were the same under both the "civil" and "criminal" proceedings.

When the traditional statutory elements -- or Blockburger -- test is applied to the proceedings under review, it readily becomes clear that both punishments meted out here were for the same offense. Blockburger states that, in comparing two offenses, "if each statute requires proof of an additional fact which the other does not," the offenses are not considered the "same offense" for Double Jeopardy purposes. Blockburger v. United States, 284 U.S. 299,304 (1932). Put another way, Justice Scalia has written, "If it is possible to violate each one without violating the other, then they cannot constitute the 'same offense.'" Grady v. Corbin, 495 U.S. 508, 529 (1990) (Scalia) maj. overruled by United States v. Dixon, ___ U.S. ___, 125 L. Ed. 556 (1993).

Since Blockburger, this Court has expanded the inquiry a court must make when engaging in a Double Jeopardy Clause analysis. In addition to examining the elements of the offenses to determine whether they are the same, as required under Blockburger, a court must also consider whether one offense is a lesser included offense of the other. For example, in Brown v. Ohio, 432 U.S. 161, 167-68 (1966), this Court applied this lesser included offense analysis to the crimes of joyriding and auto theft:

> Joyriding consists of taking or operating a vehicle without the owner's consent, and auto theft consists of joyriding with the intent permanently to deprive the owner of possession... The prosecutor who has established joyriding need only prove the requisite intent in order to establish auto theft; the prosecutor who has established auto theft necessarily has established joyriding as well.

The Brown Court held that because the lesser offense, joyriding, required no proof beyond that required for the greater offense of auto theft, the two were the "same offense" for purposes of the Double Jeopardy Clause. Furthermore, under this Court's decision in Harris v. Oklahoma, 433 U.S. 682 (1977), a court must determine whether one offense is a "species of a lesser-included offense" of the other, thereby expanding the analysis required under Brown. The Court found that commission of a stated felony, in Harris robbery, was a lesser included offense of the felony murder rule and was thus barred.

In this case, J&T Coal received "civil" fines of approximately $300,000 for failing to adhere to various MSHA standards codified under CFR Title 30, which constituted a violation of 30 U.S.C. § 820(a). The second,

"criminal" prosecution of J&T merely alleged willful or knowing violation of the same MSHA standards, which constitutes a violation of 30 U.S.C. § 820(d), allowing for criminal fines which in this case totaled $1,400,000.

The criminal prosecution resulted in the conviction of J&T for Counts I, III, V, VII, IX, and XI of the indictment. (App. 35.) These counts alleged "willful" violations of 30 C.F.R. §§ 75.202(a), 75.202(b), 75.203(a), 75.203(b), 75.220(a)(1), and 75.1200-2(b). (App. 40-48.) Each of these violations had previously been alleged and prosecuted as the basis for the "civil" fines imposed in the amount of approximately $300,000.[5] The criminal prosecution under 30 U.S.C. § 820(d) merely asserted that several of the same regulations previously prosecuted under § 820(a) were violated "willfully."

The Fourth Circuit determined that since § 820(d) contained a willfulness component not present in § 820(a), the Blockburger requirement was satisfied:

> The government contends that under United States v. Dixon, ___ U.S. ___, S. Ct. 2849 (1993), which readopted the "same elements" test of Blockburger v. United States,

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[5]The trial court's double jeopardy decision, in fact, acknowledges that the "civil" and "criminal" proceedings involved the same acts, stating: "On December 16, 1992, J&T Coal was indicted under 30 U.S.C. § 820(d) for willful violations of the same safety standards that formed the basis for the ["civil"] assessments." (Emphasis added.) (App. 16.) The prosecution concedes, as it must, that in this case "the conduct which gave rise to the civil assessment and the conduct which gave rise to the criminal prosecution were the same." Appellee's br. in Fourth Circuit at 13.

> 284 U.S. 299 (1932), it was required to prove the additional element of a willful violation of the mandatory health or safety rules to secure a conviction under § 820(d) and, therefore, the criminal prosecution is not subject to the double jeopardy bar. This contention is correct. The elements of the offenses described in the two sections are not the same. Section 820(a), which established civil penalties, requires only proof of a violation of the health or safety standards by a preponderance of the evidence, but § 820(d), the criminal penalty section, requires proof beyond a reasonable doubt of a willful violation or refusal to comply with the same standards.

(App. 5-6.)

The Fourth Circuit's reasoning that the offenses here at issue survive the Blockburger test, if upheld, would stand Double Jeopardy jurisprudence on its head. Manifestly, the fact that one statute contains one willfulness element not present in a second statute is insufficient to differentiate the two "offenses" under Blockburger. If the prosecution's theory were the applicable analysis, the protection of the Double Jeopardy Clause would be non-existent. Blockburger states that, in comparing two offenses, each statute must require proof of an additional fact which the other does not or the offenses should be considered the "same offense" for Double Jeopardy purposes. Blockburger v. United States, 284 U.S. 299, 304 (1932).

Certainly, the Fourth Circuit's rule that the presence of a single willfulness component in § 820(d) is sufficient to

overcome J&T's Double Jeopardy claim, if adopted, would do great violence to Brown v. Ohio, 432 U.S. 161 (1977); Harris v. Oklahoma, 433 U.S. 682 (1977), and the concept that, for purposes of Double Jeopardy, a "lesser included offense" is considered the "same offense" as the greater offense charged. Here, the first prosecution involved violations of MSHA regulations while the second prosecution involved alleged willful violation of the same regulations. Hence, the underlying "civil" violation (the lesser included offense) had already been adjudicated when the second wave of prosecution began.

* * *

This Petition raises Constitutional issues of the utmost importance; questions upon which the Circuits are split, and on which the dictates of this Court are being misconstrued and disavowed. The Fourth Circuit's logic is flawed and dangerous; yet it serves well to illustrate the existing confusion in the Double Jeopardy arena, and the need for this Court to provide further guidance.

II. THE FOURTH CIRCUIT IGNORED THE ABSENCE OF REQUIRED FINDINGS OF FACT, AND IMPERMISSIBLY PERMITTED THE SENTENCING COURT, IN ASSESSING J&T'S FINE, TO RELY ON THE FUNDS OF A SECOND CORPORATION, JAD, -- WHICH WAS NOT BEFORE THE COURT AND HAD NOT BEEN DETERMINED TO BE AN ALTER EGO OF J&T.

Fed. R. Crim. P. 32(c)(3)(D) requires that the sentencing court, as to each matter controverted in a presentence report, either make a finding as to the accuracy of the challenged factual proposition or determine that no reliance will be placed on that proposition at the time of sentencing. (App. 54.) The rule leaves no discretion in this

regard. Rarely has the justification for a federal rule been so well illustrated as by this case.

A. The Questions of Whether J&T had the Ability to pay a $1.4 Million Fine and Whether J&T and JAD Should be Considered an Intertwined Entity were Controverted and no Rule 32 Findings were Made.

In assessing J&T's ability to pay a fine in excess of one million dollars, the trial court was required to consider various factors. Under §§ 8C2.8(a)(10) and 8C2.10 of the Sentencing Guidelines and 18 U.S.C. §§ 3572 and 3553, the court was required to consider various factors relating to J&T's ability to pay a fine. Here, the district court not only failed to determine whether J&T had the ability to pay the fine imposed, but also failed to state these findings on the record. In reality, the record left little room for dispute that J&T was in no condition to pay a $1.4 million fine. Supra at 3.

The district court, in imposing sentence, did briefly turn to the factors enumerated in section 3572; but, rather than making findings as to the factors, the Court simply stated, "Many of these [factors] ring hollow in light of the fact that this company is in bankruptcy." (App. 33.) The fact that J&T was in bankruptcy should not have relieved the Court of having to make the specific findings required under Section 3572.[6] Indeed, J&T's bankruptcy directly affected many of the factors listed in Section 3572, and weighed in favor of a low fine.

---

[6]Bankruptcy does not mean that the Debtor was without assets or unable to meet all of its obligations.

Instead, the court considered evidence of the assets of a second corporation, JAD, which was a separate corporate entity, in fixing J&T's fine. Even the prosecution recognized that J&T's inability to pay a fine on its own was an obstacle to the sanction imposed. The prosecution acknowledged:

> If this Court were to merely look at the surface and accept J&T's suggestion that they're in bankruptcy, that's where this Court is going to look, that's it, might as well just stop here and not go any further.

(JA 305.) It was the government's theory, therefore, that J&T's relationship with a second company, JAD, was such that J&T and JAD should be considered one entity and JAD's assets applied to J&T's fines. (JA 307-08, 322.) Accordingly, the prosecution put on extensive evidence in this regard. J&T objected to such claims on the record and in its objections to the presentence report. (JA 406-07.)[7]

Despite the prosecution's repeated claims that the court must pierce J&T's "corporate veil" to get to JAD's money (JA 306-08, 322), the court specifically declined to pierce the veil. (App. 29, 33.) Yet, it imposed the maximum fine available under the guidelines by accepting evidence of

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[7]In fact, the evidence revealed that J&T and JAD had two separate charters (JA 222-23), two separate purposes -- J&T mined, JAD did not -- (JA 220, 222), and were formed in different decades. (JA 222-223.) J&T and JAD had separate minute books, stock books, annual reports, tax returns and bank accounts. (JA 319.) Notably, JAD and J&T had somewhat different ownership. Alleged liability of JAD affected shareholders, such as Julia McAfee, who were not owners of J&T, but who had an interest in JAD. (JA 236, 277-78.)

JAD's financial status even though JAD was not the defendant.

The court failed to make a specific finding that J&T had the ability to pay. (Even the Presentence Report stated that J&T did not have the ability to pay on its own. (JA 397.)) The court also failed to find that J&T and JAD were alter egos. (App. 33.) Presumably, it used JAD's funds to attempt to justify J&T's fine. Yet, there was no evidence JAD had funds sufficient to cover the massive fine.

The presentence report suggested only that JAD had sufficient resources to pay the fine recommended in that report, which had a range of $119,000 to $238,000. (JA 398 -- under seal.) The trial court, however, rejected that fine recommendation, imposed a fine of $1.4 million, and never made any determination as to the defendant's ability to pay. Because it ignored the requirements of Rule 32 and relevant statutes, the Court imposed a fine that J&T could not possibly pay.

Notably, under an analogous guideline for fines of individuals, Sentencing Guideline § 5E1.2, there is a split raging among the Circuits with respect to the necessity of specific findings relating to imposition of fines.[8]

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[8]This controversy was summarized by the Eleventh Circuit in United States v. Lombardo, 35 F.3d 526, 529 (11th Cir. 1994):

> The circuits are divided on this issue. Compare United States v. Tosca, 18 F.3d 1352, 1354-55 (6th Cir. 1994) (holding that specific findings are not required where "it may be fairly inferred [from the record] that the district court considered ... the factors required by law"); United States v. Savoie, 985

(continued...)

This case offers the Court an opportunity to provide guidance

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[8](...continued)
F.2d 612, 620 (1st Cir. 1993) (holding that the failure to make specific findings in open court concerning the defendant's financial condition and prospects did not necessitate reversal); United States v. Fair, 979 F.2d 1037, 1040-41 (5th Cir. 1992) (holding that specific findings are only required where the district court adopts the presentencing report but then departs from the report's recommendation on fines); United States v. Washington-Williams, 945 F.2d 325, 327-28 (10th Cir. 1991) (holding that express findings are not required); United States v. Marquez, 941 F.2d 60, 65 (2d Cir. 1991) (holding that an explanation of the court's consideration of the factors would be helpful but is not required); and United States v. Mastropierro, 931 F.2d 905, 906 (D.C. Cir. 1991) ("The guidelines set forth no requirement, however, that the sentencing court make express findings on this question and we decline to create one.") with United States v. Demes, 941 F.2d 220, 223 (3d Cir.) (vacating fine because the district court made no finding as to the defendant's ability to pay and therefore the appellate court could not conclude that the district court had considered the issue), cert. denied, 502 U.S. 949, 112 S. Ct. 399, 116 L. Ed. 2d 348 (1991); United States v. Masters, 924 F.2d 1362, 1369 (7th Cir.) (vacating fine because, among other reasons, "the judge made no findings with respect to any of the factors and he must do so on remand before imposing a fine), cert. denied, 500 U.S. 919, 111 S. Ct. 2019, 114 L. Ed. 2d 105 (1991); and United States v. Cammisano, 917 F.2d 1057, 1064 (8th Cir. 1990) (holding that district courts "must make specific findings on the record that demonstrate that the factors [set forth in Guidelines § 5E1.2] were considered before a fine may be imposed" (internal quotation omitted, alteration in original)); cf. United States v. Quan-Guerra, 929 F.2d 1425, 1426 (9th Cir. 1991) ("When the record demonstrates unequivocally that the defendant is indigent, the district court is required to determine whether the defendant has the ability to pay any fine which might be imposed.")

on this split of authority and to make clear that a fine cannot be imposed where there is no evidence of record that the defendant could possibly pay it.

B. The Fourth Circuit's Ruling that it is Proper to Consider a Second, Unindicted Corporation's Assets in Imposing J&T's Fine is an Affront to Due Process and the Precedent of this Court.

Both the district court and Fourth Circuit held that it was too "cumbersome" to require resolution of the presentence report's corporate veil allegations at sentencing. (App. 13, 29.) Hence, no finding was made as to J&T's objection to the corporate veil allegations in the presentence report. Yet JAD's resources were considered in fixing J&T's fine.

The Fourth Circuit purported to justify such lax procedural safeguards in this case (involving fines in excess of one million dollars) by reasoning that appropriate proceedings could be held later in the district or bankruptcy court in efforts to resolve the parties' rights:

> If further proceedings are needed to bring in JAD and/or the two [sic] owners of J&T and JAD, this can be done by appropriate proceedings in the bankruptcy court or the district court. It could not be done at the sentencing proceeding because neither JAD nor the two [sic] individual owners of J&T and JAD were before the court.

(App. 13.) The courts below, in effect, constructed a system by which federal judges may "impose fines now, and ask questions later."

The Fourth Circuit's assurance that J&T and JAD's steamrolled procedural safeguards could be addressed at a later date are unfounded. An opportunity to litigate one's criminal liability for the first time at the punishment stage is not meaningful either in time or manner. Cf. United States v. Crozier, 777 F.2d 1376, 183-84 (9th Cir. 1985) (stating, in the context of criminal forfeiture, that "a hearing for parties with a third party interest which takes place months or years after a restraining order is issued, cannot be construed as a hearing provided 'at a meaningful time.'").

The Fourth Circuit's suggestion that JAD could receive an opportunity to be heard on the alter ego issue after staggering criminal liability had already been established would not offer due process at a meaningful time. This is supported by well established law that jurisdiction over a corporation does not afford jurisdiction over an alter ego until after a court has pierced the corporate veil. See Zenith Radio Corp. v. Hazletine, 395 U.S. 100, 111 (1969) (holding that judgment against subsidiary corporation is not enforceable against parent corporation because parent had never had its day in court on whether it and its subsidiary should be considered as one and the same).[9]

The corollary should be true here. J&T's fines should not be based on JAD's assets unless and until it is determined the two entities should be considered one.

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[9]Further, even if JAD were determined to be the alter ego of J&T at a subsequent proceeding, this would not cure the absence of due process as to JAD where the "punishment" of a $1.4 million fine already had been meted out in JAD's absence. Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 86-87 (1988); Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915).

J&T filed clear objections to the presentence report relating to its inability to pay its fine and denying its alleged interrelationship with JAD. (JA 406-07.) The trial court's failure to rule on these controverted issues runs afoul of the non-discretionary dictates of Fed. R. Crim. P. 32(c)(3)(D) and 18 U.S.C. § 3572. Had the trial court obeyed these modest requirements, it could not have reached the conclusion that J&T could pay the $1.4 million fine.

The Fourth Circuit's approval of the trial court's "non-findings" was nothing less than an abdication of judicial responsibility. Further, the court's suggestion that it was too "cumbersome" to mandate that J&T and JAD's relationship be factually resolved at sentencing is unfair to J&T, as well as to future litigants.

While Constitutional protections, indeed, may be cumbersome at times, they are the defining principles of the Rule of Law. It is impermissible to impose fines on J&T by backhand reference to a second entity to which J&T may or may not be related. Certainly, the sentencing guidelines themselves offer no support for the court's actions.

The decision below sets a dangerous precedent, particularly when it is considered that the Fourth Circuit recognized that J&T and JAD's relationship was "not unusual" in the mining industry. (App. 4.) If the Fourth Circuit's logic is correct, any corporation may find that its fine can be based, not on its own assets, but on those of a second larger organization with which it may or may not be closely affiliated. This decision cries out for further review and reversal.

III. THE COURTS ERRED IN REFUSING TO GROUP J&T'S OFFENSES UNDER THE SENTENCING GUIDELINES, AND 'IN ASSESSING AN INAPPROPRIATE INCREASE IN OFFENSE LEVEL GIVEN THE DECISION NOT TO GROUP.

J&T was convicted of misdemeanor mining violations not specifically addressed by an existing guideline. Because there was no expressly applicable guideline, the court, under 18 U.S.C. § 3553 and U.S.S.G. § 2X5.1, applied the most analogous guideline for the offense. The court turned to the guideline covering involuntary manslaughter, U.S.S.G. § 2A1.4(a)(2), a significant felony which carries a base level of fourteen under the guidelines.

In determining whether counts should be grouped, the grouping guideline directs the court to group counts "involving substantially the same harm" U.S.S.G. § 3D1.2. (App. 63.) J&T's convictions arose from a single incident involving the same victims. Grouping the offenses was appropriate. The court concluded, however, that the offense involved multiple victims and that subsections (a), (b) and (d) of Section 3D1.2 could not apply. (App. 23-29.) Following the analysis of Application Note 2 in the Commentary to Section 3D1.2 (App. 63, 65-66), the "victim" of a 30 U.S.C. Section 820 violation is society's interest in having coal mined only in accordance with the mandatory safety standards. That victim would have been harmed, and punishment would have followed, if no miners had been affected.

Even if the four miners are considered the primary victims of the roof fall, the court's decision not to group was erroneous here since each count involved precisely the same victims. (App. 40-48.) The trial court found that it could not group based upon an overly strict interpretation of the

comment at U.S.S.G. § 3D1.2 and a literal reading that where more than one victim is involved -- even if the same victims are involved in each count -- grouping is prohibited under subsections (a) and (b).

J&T's offense involved a single decisional process. The facts of this case do not warrant a technical refusal to group where the multiple counts arise from a single incident involving the same victims.

While J&T contends that the court erred in refusing to group in this case, the court was also wrong in the manner it calculated its refusal to group. The court added five levels to J&T's offense level based on the fact that J&T was guilty of six violations. The problem with this analysis is that the "analogous guideline" upon which the sentence was based was involuntary manslaughter. There were four deaths involved in the roof fall incident. There can be no more homicide convictions than there are deaths. Buchanan v. Commonwealth, 238 Va. 389, 384 S.E.2d 757 (1989), cert. denied, 493 U.S. 1063 (1990). Thus, at most there could only be four "involuntary manslaughters" here. The court could not merely conclude that six mining misdemeanors necessarily correlated to six "units" of "manslaughter" for purposes of the calculations of § 3D1.4. (App. 75.) Properly considered, only three additional "involuntary manslaughter convictions" were possible in this case.

The court's imposition of a five level increase to "19" -- as opposed to a three level increase to "17" -- literally doubled the available fine under the guidelines. (App. 81.) The manner in which this fine was imposed only confirms that this is a case in which "rough justice" became clear injustice.

CONCLUSION

This Petition presents issues of vital importance on which the Circuits are split. As illustrated by this case, decisions of this Court including Austin v. United States, ___ U.S. ___, 125 L. Ed. 2d 488 (1993), United States v. Halper, 490 U.S. 435 (1989), and Blockburger v. United States, 284 U.S. 299 (1932) are being misconstrued or disregarded.

The Fourth Circuit's decision below does violence to this Court's Double Jeopardy jurisprudence. Its holding that the mandatory language of Fed. R. Crim. P. 32, and related statutes, may be glossed over where its requirements are "cumbersome" also merits this Court's review. J&T's Petition should be granted to clarify the law and to correct a manifest injustice below.

Respectfully submitted,

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

J & T COAL, INCORPORATED,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GARRY WILLIAMS, *Defendant-Appellant.*	No. 93-5435
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. J & T COAL, INCORPORATED, *Defendant-Appellant.*	No. 93-5830

Appeals from the United States District Court
for the Western District of Virginia, at Big Stone Gap.
Samuel G. Wilson, District Judge.
(CR-92-61)

Argued: April 4, 1995

Decided: May 30, 1995

Before WIDENER and WILKINSON, Circuit Judges,
and CHAPMAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Frank Kenneth Friedman, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Appellant J & T Coal; William Elbert Bradshaw, BRADSHAW & BRADSHAW, Big Stone Gap, Virginia, for Appellant Williams. Richard Albert Lloret, Assistant United States Attorney, Abingdon, Virginia; Stephen Urban Baer, Assistant United States Attorney, Charlottesville, Virginia, for Appellee. **ON BRIEF:** M. Caldwell Butler, Sr., Clark H. Worthy, WOODS, ROGERS & HAZLEGROVE, Roanoke, Virginia, for Appellant J & T Coal; Birg E. Sergeant, LAW OFFICES OF BIRG E. SERGEANT, Pennington Gap, Virginia, for Appellant Williams. Robert P. Crouch, Jr., United States Attorney, Charlottesville, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

This appeal arises from the conviction of J & T Coal, Inc. (J & T) on six counts of willful violation of Title 30, U.S.C. § 820(d) and Title 30, Code of Federal Regulations, § 75.202(b). The prosecution resulted from a massive roof fall in J & T Coal Mine No. 1 on February 13, 1991 that caused the deaths of four miners, and the claim that J & T and its mine superintendent, Garry Williams, had knowingly violated various mandatory safety and health standards.

Prior to the criminal trial, the Federal Mines Safety and Health Review Commission (FMSHRC) assessed $300,000 in civil sanctions against J & T pursuant to 30 U.S.C. § 820(a). Shortly thereafter, an administrative law judge entered a default judgment against J & T in the amount of $300,166, which was not paid. This resulted in an action by the United States Attorney for the Western District of Virginia to collect the judgment, but the civil fine is still unpaid.

When J & T and Garry Williams were indicted, Williams entered into a plea agreement with the United States in which he pled guilty to three counts and agreed to testify for the prosecution. J & T moved to dismiss the indictment claiming that because the government had imposed the civil penalties provided by 30 U.S.C. § 820(a) and was now seeking the criminal fines provided by 30 U.S.C. § 820(d), it was being put in jeopardy twice for the same act. This motion was denied, and at trial J & T was found guilty on all six counts and was fined $1,400,000.[1] Shortly thereafter, J & T filed for protection under Chapter VII of the Bankruptcy Act.

Williams appeals only the district court's failure to group his offenses under the Sentencing Guidelines and argues that this failure inappropriately increased his offense level.

J & T appeals the district court's denial of its double jeopardy claim. It also asserts that the district court committed error at sentencing by failing to group its offenses and by failing to make necessary findings of fact mandated by Federal Rule of Criminal Procedure 32(c)(1), 18 U.S.C. § 3572, and the Sentencing Guidelines as to J & T's ability to pay the fines, as to the financial interconnection between J & T and an affiliated corporation, JAD, to support the court's ruling that it could consider JAD's finances in arriving at J & T's fine, and as to J & T's alleged prior criminal conduct. J & T also claims that the court misapplied the Sentencing Guidelines in setting its fine.

We find no error and affirm the convictions and the sentences.

I.

The cause of this mining tragedy is not in dispute. It resulted from the knowing and willful infraction over a course of several days of established safety standards in mining in violation of the Mines Roof Control Plan. These violations resulted in a massive roof collapse and the deaths of four miners. Immediately following the collapse, an extensive and expensive rescue effort was made. A thorough investi-

[1]The trial court reduced this fine by the amount of the civil fine.

gation ensued. An estimate of the cost to the government of the rescue effort, the investigation, the civil compliance procedure, and legal fees exceeds $163,000.

The association between JAD and J & T as to finances and control does not appear to be unusual in the coal mining business. J & T is a Virginia corporation with no real assets. It was incorporated in 1980 for the purposes of mining, producing and selling coal. It was capitalized at $1,000, and after ten years of mining, its retained earnings were $664.00. J & T leased all of its equipment from JAD and sold all of its coal to JAD, but J & T's books reflected no lease expenses, no general administrative expenses, and no evidence of accounts payable or receivable between the two corporations. JAD gave J & T money when JAD felt it was necessary. JAD is a Virginia corporation and both J & T and JAD are owned by the same two individuals. JAD maintained several other subsidiary companies similar to J & T. Garry Williams worked for JAD as either a miner or a superintendent from 1982 through November 1992. At times Garry Williams operated his own coal company, Swift Coal, but while doing so, he remained employed by JAD.

II.

Double jeopardy raises a legal issue of constitutional dimensions, and we review questions of law de novo. *United States v. Daughtrey*, 874 F.2d 213, 218 (4th Cir. 1989). "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U. S. Const. amend. V. This protection has been extended to imprisonment and monetary penalties. *See United States v. Halper*, 490 U.S. 435 (1989). "[T]he double jeopardy clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *Id.* at 440.

J & T argues that because the $300,000 civil fine imposed by the FMSHRC punished it for violation of the mining regulations, and the violation of the same mining regulations was the basis of the criminal fine imposed by the district court, the large fines imposed in separate and successive proceedings punished it twice for the same offense and violated its Fifth Amendment protection against double jeopardy. The

first amount was imposed pursuant to 30 U.S.C. § 820(a), which covers civil penalties for violation of the mandatory health or safety standards. The second and larger amount was imposed under § 820(d) which provides criminal penalties for the *willful* violation of the same mandatory health or safety standards covering mining operations. J & T contends that both fines were punitive in nature and, therefore, the second fine was punishment for the same act.

The government contends that under *United States v. Dixon*, ___ U. S. ___, 113 S. Ct. 2849 (1993), which readopted the "same elements" test of *Blockburger v. United States*, 284 U.S. 299 (1932), it was required to prove the additional element of a willful violation of the mandatory health or safety rules to secure a conviction under § 820(d) and, therefore, the criminal prosecution is not subject to the double jeopardy bar. This contention is correct. The elements of the offenses described in the two sections are not the same. Section 820(a),[2] which establishes civil penalties, requires only proof of a violation of the health or safety standards by a preponderance of the evidence, but § 820(d),[3] the criminal penalty section, requires proof beyond a rea-

[2]30 United States Code § 820 Penalties

(a) Civil penalty for violation of mandatory health or safety standards

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

[3](d) Criminal penalties.

Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title and section 817 of this title, or any other order incorporated in a final decision issued under this subchapter, except an order incorporated in a decision under subsection (a) of this section or section 815(c) of this title, shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment of not more than

sonable doubt of a willful violation or refusal to comply with the same standards.

J & T seeks solace from certain language in *Austin v. United States*, ___ U.S. ___, 113 S.Ct. 2801 (1993), but *Austin* is an Eighth Amendment Excessive Fines clause case involving a forfeiture of a home and business under 21 U.S.C. §§ 881(a)(4) and (a)(7) by way of summary judgment after the owner had entered a plea of guilty to possession of cocaine with intent to distribute. We find it inapplicable to the present facts.

J & T argues that the civil fine was punishment, as was the criminal fine, and that in *United States v. Halper*, *supra*, the court found that such civil punishment, when coupled with a criminal fine, violated the double jeopardy clause.

Halper was the manager of a company that provided medical services for Medicare patients. He was convicted of submitting 65 false claims for government reimbursement in violation of the Federal False-Claims statute, 18 U.S.C. § 287. He was imprisoned and fined $5,000. Then the district court granted summary judgment against him in the government's action brought under the Civil False Claims Act, 31 U.S.C. §§ 3729-3751, which would make him liable for $2,000 on each of the 65 counts, plus twice the amount of the government's actual damages of $585, and the cost of the action. The court held that the statutory penalty authorized by the act *as applied to Halper* violated the double jeopardy clause, but it pointed out that this was the rare case where a "small gauge offender" had sustained a criminal penalty, and the government thereafter sought a civil penalty that had no rational relation to the purpose of compensating the government for its loss. Therefore, it appeared to be an additional penalty thus crossing the line between a permissible remedy and a prohibited punishment. In *Halper*, the court did not overrule *Helvering v.*

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one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than $50,000 or by imprisonment for not more than five years, or both.

Mitchell, 303 U.S. 148 (1956) which held that a criminal and a civil sanction may be imposed by the government with respect to the same act and that a remedial sanction did not violate double jeopardy. Whether a given sanction is criminal is a matter of statutory construction. However, the court determined in *Halper* that "a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purposes of double jeopardy analysis." *Id.* at 443.

In *Halper*, the civil proceeding followed the criminal proceeding, while in the present case the criminal proceeding was subsequent to the civil proceeding. We find the order of the proceedings of no consequence.

Halper also held that in determining whether a subsequent sanction violates double jeopardy "the label 'criminal' and 'civil' are not of paramount importance."

> The determination of whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied to the individual case serves the goals of punishment.

Halper at 448. The court went on to find that the determination of a precise dollar figure at which a civil sanction accomplished its remedial purpose of making the government whole involved an element of "rough justice" but added "we have recognized that in the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the government whole." *Id.* at 449.

In the present case, there seems to be no dispute that the government's costs were in excess of $160,000, which would make the civil sanction of $300,166 safely within the double damages provision approved in *Halper*. J & T cannot be compared to "small-gauge offender" Halper. *Halper* involved 65 false claims for medical services totaling less than $600 while the present case involves the violation of safety standards that resulted in the deaths of four miners and

$160,000 in expenses to the government. The civil penalty assessed against J & T was reasonable and remedial. Under the present facts, it did not cross the line into the forbidden area of punishment.

Halper directs that whether a sanction is criminal is a matter of statutory construction. It is obvious from the language of § 828(a) that Congress intended the penalties imposed thereunder to be civil. The statute is so labeled, and a violation of the safety and health rules under this section does not require a finding of scienter. Violations of the section are assessed regardless of fault and have the obvious purpose of protecting the health and safety of miners. We agree with the Sixth Circuit in *United States v. WRW Corporation*, 986 F.2d 138, 141-142 (6th Cir. 1993): "[W]e conclude that imposing a civil penalty for health and safety violations which varies in amount based upon the severity of the violation and the operator's attempts to come into immediate compliance may as readily be ascribed to the remedial purpose of promoting mine safety."

In *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), the Court held that unless the purpose or effect of the civil penalty is shown clearly to be punitive, courts will not "override Congress' manifest preference for a civil sanction." *Id.* at 365. We have concluded that the intent of Congress on this issue is plain and unambiguous. The penalty is remedial in nature, and there is no violation of the double jeopardy clause.

III.

Both appellants contend that the district court erred in considering their offenses as analogous to four separate cases of involuntary manslaughter, because there was no guideline expressly applicable to the violation of 30 U.S.C. § 820(d). They claim they were only guilty of misdemeanors, while involuntary manslaughter is a felony. They also assert that their offenses should have been grouped for purposes of sentencing under Sentencing Guideline § 3D1.2, because the counts involved "substantially the same harm."

The district judge was very careful and correct in his analysis of the unusual problems presented by these cases and also in his inter-

pretation and application of 18 U.S.C. § 3553 and the Sentencing Guidelines.

First, he determined that there was not an applicable sentencing guideline and then correctly turned to 18 U.S.C. § 3553(b) for direction. This section provides in part:

> In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

This section sets forth the factors to be considered by the court in imposing the sentence and provides that the court

> shall consider –
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

The court then found that the defendants' offenses involved four counts of involuntary manslaughter as covered by § 2A1.4 of the Sentencing Guidelines and a base offense level of 14 "because the conduct was reckless." Section 2A1.4(a)(2). Application Note 1 states:

> "Reckless" refers to a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. The term thus includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112. A homicide resulting from driving, or similarly dangerous actions, while under the influence of alcohol or drugs ordinarily should be treated as reckless.

Section 18 U.S.C. § 1112(a) defines "manslaughter" as

> the unlawful killing of a human being without malice. It is of two kinds:
>
> * * *
>
> Involuntary – In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

We agree with the district court that involuntary manslaughter covered by § 2A1.4(a)(2) is the most analogous and fits the facts in this case. The actions for which the defendants stand convicted were certainly reckless and resulted in the killing of four human beings. The jury found that J & T's actions amounted to willful violations of the safety regulations, and Williams pled guilty to such willful violations.

The district court then found that the counts should not be grouped under § 3D1.2 which provides:

Groups of Closely-Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

> (a) When counts involve the same victim and the same act or transaction.
>
> (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
>
> (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.
>
> (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.
>
> * * *
>
> Specifically excluded from the operation of this subsection are:
>
> all offenses in Chapter Two, Part A . . . .

The district court then found that there were four victims so subparagraph (a) did not apply, but it then went on to correctly find that grouping under this section of the guidelines did not apply to involuntary manslaughter because it is an offense covered by Chapter Two, Part A.

The district court was correct in its decision that grouping of the counts was not available under the Sentencing Guidelines. Therefore, the offense level of 19 was proper, and the guideline range of $700,000 to $1,400,000 was applicable to J & T, and there was no error in the consecutive sentences given to Williams.

IV.

J & T argues that the district court did not make findings of fact as required by Fed. R. Crim. P. 32 on the disputed issues of J & T's ability to pay the fine, and the alleged intertwining of J & T and JAD, although the court considered JAD's financial resources without a finding that J & T was the alter ego of JAD. The appellant also claims the court failed to make such finding as to J & T's alleged prior criminal conduct. We find no merit to these claims. The record reflects that the district court spent the better part of two days hearing testimony and arguments of counsel on these issues prior to sentencing. A majority of this time was spent in addressing the issues of J & T's ability to pay the fines and the connection between the two corporations owned by Carl McAfee and Paul Dean, and whether the court should pierce the corporate veil of J & T so as to get to the assets of the two stockholders and/or JAD.

The court found:

> But it is that fact [J & T's bankruptcy] in and of itself as indicative from the evidence that the court has heard that the decision to place the defendant corporation in bankruptcy was a matter of expediency, not necessarily one that was required but one that was desired.
>
> It is clear from financial information that I have reviewed that substantial funds were pumped into this company by JAD when it suited their interest, and they were withheld when it suited JAD's interest, and that the principals of JAD and J & T are substantially the same.
>
> That being the case, I do not believe it would be appropriate or required that the corporate veil be pierced. I do not,

> I do not think that Congress intended for such cumbersome procedures under circumstances such as this to be required.
>
> I must make a reasoned decision based upon all the facts in the case that I have heard. I see no basis, given the conclusion that they pumped money in when necessary, they closed it down when necessary, I see no reason for imposing a fine of less than $1.4 million and then reducing that fine, as I am required to do, as indicated.

The evidence had shown that J & T had little net worth and few assets. Its meager financial structure, lack of corporate records and its dependence on JAD for almost everything is set forth in § 1. The district court clearly found that J & T could pay the fines if JAD wished it to do so. The court also found that Congress did not intend for district courts to engage in such cumbersome proceedings as piercing a corporate veil before arriving at an appropriate fine or sentence. This is particularly true when a corporation, such as J & T, has been put into bankruptcy in an obvious effort to avoid payment of any fine. The court directed its clerk to immediately notify the United States Trustee in Bankruptcy of its decision and the fine against J & T. If further proceedings are needed to bring in JAD and/or the two owners of J & T and JAD, this can be done by appropriate proceedings in the bankruptcy court or the district court. It could not be done at the sentencing proceeding because neither JAD nor the two individual owners of J & T and JAD were before the court.

. . . . . .

The findings of the district court were sufficiently specific on the issue of J & T's ability to pay the fine and the connection between J & T and JAD to comply with the Federal Rules of Criminal Procedure.

Appellant claims the district court did not make specific findings as to J & T's prior criminal conduct. The district court found that mining companies owned or operated by Mr. Dean and Mr. McAfee had been cited for 1233 mining violations since 1980, and over 400 such violations had involved defendant Garry Williams in his position as superintendent. Sentencing Guideline § 8C2.8(a)(6) provides:

> (a) In determining the amount of the fine within the applicable guideline range, the court should consider:

> (6) any prior criminal record of an individual within high-level personnel of the organization or high-level personnel of a unit of the organization who participated in, condoned, or was willfully ignorant of the criminal conduct;

Garry Williams, as superintendent of J & T, was a "high-level" person within J & T and his acts, as such, were properly considered in setting the J & T fine. Appellant argues that the court did not specifically find which violations by Williams or by the Dean and McAfee companies were those of J & T. The presentence report found that prior to the fatal accident, J & T had been cited for 88 mining violations.

After considering numerous objections to the presentence report, the court inquired of defendant's counsel if there was any other objection to the report that needed to be considered. The defendant made no claim that any additional information as to its prior criminal conduct was necessary. The court had computerized printouts showing the 88 prior mining violations at the sentencing hearing. We find the court's factual findings on this point were sufficient.

Therefore, the convictions and sentences of the appellants are

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

UNITED STATES OF AMERICA	*	CRIMINAL
	*	ACTION NO.
v.	*	92-00061-01-B
	*	
J&T COAL, INC.	*	

CORRECTED MEMORANDUM OPINION
AND ORDER

Defendant J&T Coal, Inc. ("J&T Coal") has filed a motion to dismiss six counts of an indictment charging violation of 30 U.S.C. § 820(d) and 30 C.F.R. §§ 75.202(a)-(b), 75.203(a)-(b), 75.220(a)(1), and 75.1200-2(b).[1] J&T Coal contends that because the government previously assessed civil penalties against it under 30 U.S.C. § 820(a) for violation of the same regulations, pursuit of the criminal penalties under § 820(d) violates the Double Jeopardy Clause. Because J&T Coal has failed to prove that the assessments under § 820(a) were punitive rather than remedial, the court will deny its plea of double jeopardy.

I.

On February 13, 1991, a roof fall in one of J&T Coal's mines killed four miners. The Mine Safety and

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[1]The indictment also contains six counts against Garry Williams, Sr., J&T Coal's mine superintendent, charging violation of the same code section and regulations, as well as 30 U.S.C. § 820(c). These counts are not at issue.

Health Administration assessed approximately $300,000 in civil penalties against J&T Coal under 30 U.S.C. § 820(a)[2] in connection with the accident. J&T Coal defaulted on payment of the assessment, which this court subsequently enforced in a civil action brought by the government.[3] On December 16, 1992, J&T Coal was indicted under 30 U.S.C. § 820(d)[4] for willful violations of the same safety standards that formed the basis for the assessments.

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[2]Section 820(a) provides:

> Civil penalty for violation of mandatory health or safety standards.
>
> The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

30 U.S.C.A. § 820(a) (West Supp. 1991).

[3]See United States v. J & T Coal, Civ. Act. No. 92-0112-B (W.D. Va. Feb. 4, 1993) (Final Judgment and Order).

[4]Section 820(d) provides:

> Criminal penalties
>
> Any operator who willfully violates a mandatory health or safety standard. . . shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both. . . .

30 U.S.C.A. § 820(d) (West 1986).

II.

The Supreme Court has stated: "Congress may impose both a criminal and a civil sanction in respect to the same act or omission." Helvering v. Mitchell, 303 U.S. 391, 399 (1938). However, the Double Jeopardy Clause prohibits "punishing twice, or attempting [to punish twice], for the same offense." Id.; see also United States v. Halper, 490 U.S. 435, 442 (1989). Because the government previously pursued and obtained assessments for the same actions that resulted in the indictment, the issues here are whether the criminal proceedings constitute a second attempt to punish or, if successful, will in fact result in a second punishment. These questions require separate, albeit intertwined and sometimes overlapping, analyses. See id. at 442, 447; Karpa v. Commissioner of Internal Revenue, 909 F.2d 784, 787-88 (4th Cir. 1990).

A. Multiple attempts to punish.

Whether the pursuit of penalties under both §§ 820(a) and 820(d) constitutes multiple attempts to punish depends on whether, as a matter of statutory construction, § 820(a) is criminal or civil in nature. Halper, 490 U.S. at 442; Helvering v. Mitchell, 303 U.S. 391, 399 (1938). The Supreme Court explained the proper two pronged analysis in United States v. Ward:

> First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the

> statutory scheme was so punitive either in purpose or effect as to negate that intention.

448 U.S. 242, 248-49 (1980) (citations omitted).

As to the test's first prong, Congress clearly expressed its preference that § 820(a) be considered civil in nature since the section is labeled "Civil penalty" and does not apply solely to "willful" violations. See United States v. WRW Corporation, No. 91-6253, slip op. at 4 (6th Cir. Feb. 17, 1993). The examination under the second prong must therefore clearly show a contrary purpose or effect to "override Congress' manifest preference for a civil sanction." United States v. One Assortment of 89 Firearms, 465 U.S. 354, 365 (1984). The Supreme Court has enunciated certain "helpful" factors in determining whether the sanction is punitive in purpose or effect:

> 'Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . .'

Id. at 365 n. 7 (quoting Kennedy v. Mendoza-Martinez,

372 U.S. 144, 168-69 (1963)) (emphasis in original).[5]

Applying the Mendoza-Martinez factors, the court does not find sufficient proof of a contrary purpose or effect to override Congress' preference that the penalty provided under § 820(a) be considered civil in nature. Several factors can be disposed by summarily. The first three factors clearly are not implicated by § 820(a). WRW Corporation, slip op. at 5. Likewise, the fifth factor-- whether the underlying behavior is already a crime-- is not implicated because § 820(a) "cover[s] a broader range of conduct. . . [and is] not co-extensive with" § 820(d). Id. at 6. The other factors, however, require further consideration and overlap to a certain extent with the second issue -- whether this prosecution would in fact result in multiple punishments. See Halper, 490 U.S. at 448.

B. Multiple punishments in fact.

Whether the prosecution under § 820(d) would in fact result in multiple punishments for the same offense depends on whether, as applied, the earlier assessments under § 820(a) constituted punishment. The Supreme Court recently redefined the multiple punishment issue in Halper. The Court stated that the issue can be resolved "only by assessing the character of the actual sanctions imposed." Id. at 447. In so doing, "it is the purposes actually served by the sanction in question, not the

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[5]The Mendoza-Martinez factors are, however, "'neither exhaustive nor dispositive,'" id. (quoting Ward, 448 U.S. at 249), and "'may often point in differing directions,'" id. (quoting Mendoza-Martinez, 372 U.S. at 169).

underlying nature of the proceeding giving rise to the sanction, that must be evaluated." Id. at 447, n. 7.[6]

Halper held that a civil sanction constitutes criminal punishment under the Double Jeopardy Clause "to the extent the. . . sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." Id. at 449. The trial court has "the discretion to determine . . . the size of the civil sanction the Government may receive without crossing the line between remedy and punishment." Id. at 450. The court must keep in mind, however, that "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment." Id. at 446. Therefore a rational relationship need only be shown between the sanction and the damages sustained. Id. at 451.

The court's inquiry thus returns to the remaining Mendoza-Martinez factors: whether the sanction promotes retribution and deterrence, whether the sanction has an alternative purpose, and whether the sanction appears excessive in relation to the alternative purpose. J&T Coal has failed to sustain its burden of proof in this respect.[7] It has offered no evidence of any deterrent or retributive purpose in the $300,000 assessment. Absent evidence of a

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[6]Therefore, unlike in the multiple prosecution context, "the labels 'criminal' and 'civil' are not of paramount importance." Id. at 447.

[7]The defendant has the burden of proving double jeopardy. See U.S. v. Parker, 582 F.2d 953, 954 n. 2 (5th Cir. 1978), cert. denied, 440 U.S. 946 (1979).

retributive or deterrent purpose, civil penalties under § 820(a) may just as easily be said to promote the remedial goals of mine safety, WRW Corporation, slip op. at 5-6, and reimbursement for the government's expenditures in connection with the underlying acts.[8] Furthermore, the assessments under that section do not appear excessive in relation to its alternative remedial purposes. The government has offered uncontradicted evidence that its costs in investigating the accident and pursuing sanctions amounted to at least $163,729. (Elam Aff. at 2) While the sanctions under § 820(a) exceeded that figure, the court cannot say that they reached the point, as in Halper, where they did not "remotely approximate the Government's damages and actual costs, and [where] rough justice [became] clear injustice." 490 U.S. at 446.

III.

For the reasons stated above, the court finds that the prosecution under § 820(d) subsequent to the imposition of civil sanctions under § 820(a) would not subject J&T Coal to multiple punishment in contravention of the Double Jeopardy Clause.

Accordingly, J&T Coal's motion to dismiss is denied.

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[8]The court is reluctant to inquire further into the goals of § 820(a). In a concurring opinion in Halper, Justice Kennedy warned against "undertak[ing] a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding. . . . Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name." 490 U.S. at 453.

ENTER this 29th day of March 1993.

/s/ Samuel G. Wilson
DISTRICT JUDGE

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk
BY: /s/ L. Brown
Deputy Clerk

ENTERED 8-31-93 Clerk's Office U.S. Dist. Court

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for BS
Aug 31 93
Joyce F. Witt, Clerk
By: /s/ E. Stokes
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

UNITED STATES OF AMERICA *
*
* CRIMINAL, ACTION NO.
* 92-00061-01-B
v. *
*MEMORANDUM OPINION
*
J&T COAL, INC. *
*
*
*

On February 13, 1991, a roof fall in one of J&T Coal's mines killed four miners. Defendant J&T Coal, Inc. ("J&T Coal") was found guilty by a jury of six counts of violating 30 U.S.C. § 820(d) and 30 C.F.R. §§ 75.202(a)-(b), 75.203(a)-(b), 75.220(a)(1), and

75.1200-2(b), all misdemeanor mining violations[1]. At sentencing the court found that the mining violations that led to the roof fall also resulted in the deaths of the four miners. The presentence report (PSR) recommended that the counts be grouped under United States Sentencing Guideline ("Guideline") § 3D1.2 and the government objected. This opinion memorializes the court's determination that, in accordance with the language of the Guideline and the accompanying commentary, the counts should not be grouped for the purposes of sentencing.

I.

J&T Coal was convicted of misdemeanor mining violations not specifically addressed by an existing Guideline. Where there is no expressly applicable guideline, the court is directed by 18 U.S.C. § 3553 and Guideline § 2X5.1 to apply the most analogous guideline for the offense. Specifically, the statute provides:

> In the absence of applicable sentencing guideline, the court shall impose an appropriate sentence having due regard for the purposes set forth in subsection (a) (2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by

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[1]Garry Williams, Sr., J&T Coal's mine superintendent, pled guilty to three counts for violations of the same code section and regulations, as well as 30 U.S.C. § 820(c). Mr. Williams was sentenced accordingly.

> guidelines applicable to similar offenses and offenders and to the applicable policy statements of the sentencing commission.

18 U.S.C. § 3553(b) (Supp. 1993). In the court's view, J&T Coal's offenses resulted in nothing less than four counts of involuntary manslaughter, and therefore the most analogous guideline is § 2A1.4, the guideline covering involuntary manslaughter. United States sentencing Commission, Guidelines Manual, § 2A1.4(a)(2) (Nov. 1992).[2]

In determining whether counts should be grouped, the grouping Guideline directs the court to group counts "involving substantially the same harm." U.S.S.G. § 3D1.2. Counts involve substantially the same harm:

> (a) When counts involve the same victim and the same act or transaction.
>
> (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.
>
> (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

---

[2]Pursuant to § 2A1.4(a)(2) the base offense level for involuntary manslaughter is 14.2.

> (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

U.S.S.G. § 3D1.2. Since both subsections (a) and (b) contain the "same victim" language, the initial inquiry in determining the applicability of those sections in this instance is whether "same victim" would include four victims who were killed by the same wrongful acts.

The Commentary to the Guideline sheds light on the "same victim" terminology of subsections (a) and (b). The Commentary provides:

> A primary consideration in this section is whether offenses involve <u>different victims</u>. For example, a defendant may stab three prison guards in a single escape attempt. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together even when there are different victims. Although such a proposal was considered, it was rejected because it probably would require departure in many cases in order to capture adequately the criminal behavior. <u>Cases involving injury to distinct victims are sufficiently comparable, whether or not the injuries are inflicted in distinct transactions, so that each count should be treated separately rather than grouped together</u>. Counts involving different

> victims . . . are grouped together only as provided in subsection (c) or (d).

Background Commentary, U.S.S.G. § 3D1.2 (emphasis added).[3] In accordance with the commentary, injury to more than one victim would prevent grouping under either subsection (a) or (b). See also United States v. Patterson, 962 F.2d 409 (5th Cir. 1992); United States v. Toler, 901 F.2d 399 (4th Cir. 1990).

It follows from the above that if the counts are to be grouped subsection (d) is the only remaining alternative.[4] However, subsection (d) also provides that involuntary manslaughter is "specifically excluded from the operation of this subsection." U.S.S.G. § 3D1.2(d).

III.

For the reasons stated above, the court concludes that the counts should not be grouped in determining the guideline range.

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[3]The Supreme court has recently addressed the use of the commentary to aid in Guideline interpretation. This court compared the commentary to an agency's interpretation of its own rules and concluded that the commentary is binding and to be given controlling weight unless inconsistent with the constitution, a federal statute or the Guidelines themselves. Stinson v. United States, ___ U.S. ___, 113 S.Ct. 1913 (1993).

[4]Section 3D1.2(c) is inapplicable since there are no specific offense characteristics at issue.

ENTER this 31st day of August, 1993.

/s/ Samuel G. Wilson
DISTRICT JUDGE

A TRUE COPY, TESTE;
JOYCE F. WITT, CLERK
By /s/ Bernadine Huff
Deputy Clerk

[Court's imposition of fine]

[MR. BAER (continuation)

this Court should not let corporations get away with criminal activity by hiding behind the corporate facade, and we would ask for 1.4 million dollar fine, Your Honor.

THE COURT: Gentlemen, the first thing I should state is that, and I have expressed it here before, and my thoughts have coalesced on it, and I do not believe that either Congress or the Sentencing Commission intended for sentencing to become cumbersome, complicated or convoluted.

The jury has already concluded that the defendant, J&T Coal, Inc., is guilty beyond a reasonable doubt. The Court has already determined that the fine range is between $700,000 and $1,400,000.

In the Court's view, the Court must simply make a reasoned determination considering the factors outlined in the sentencing guidelines Section 8C2.8 as to what the appropriate fine should be within that guideline range, and then to reduce that fine to the extent appropriate, if appropriate at all, under sentencing guideline 8C3.3.

I don't believe the difficult task of, and the heavy burden, and the strict requirements that are imposed at common law on a party seeking to pierce the corporate veil, or to establish that one corporation is simply an alter ego of another are necessary to determine the fine level within the

guideline range.

Rather, as I have said, the Court must make a reasoned determination from the factors set forth in 8C2.8 and adjust it, if appropriate, under Section 8C3.3. I look to 8C2.8 to begin with. Provides that,

> "In determining the amount of the fine within the applicable guideline range the Court should consider, (1) the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization."

As the Court views it, these are not trifling offenses. They substantially implicated the health and welfare of miners throughout Southwest Virginia, and they will not be treated as if they were trifling regulatory violations.

The organization's role in the offense, well, they're not multiple defendant corporations, but to the extent that the Sentencing Commission had in mind in this factor in considering the role, that is, the overall climate within the organization, whether or not it was the decision of the lone individual, whether it would seem to be standard business practice, it is clear to me that the superintendent was authorized to do what he did, and he did it. He might not have been specifically authorized, but he had control over the day to day business decisions, and he made them, as is amply demonstrated by no one else coming forward and saying they made any business

decisions here.

> "(3) the Court must look to any collateral consequences of conviction including civil obligations arising from the organization's conduct."

Well, a fine has been imposed and sanctions have been imposed, and those civil penalties have been imposed in this case, as the Court has reviewed it, and I've entered up a judgment order in the related proceeding, in the amount of $321,286.83.

So, I assume that whatever adjustment that there should be, that the fine should be reduced to that extent.

I'm required to look at any nonpecuniary loss caused by or threatened by the offense. The nonpecuniary loss in this case is abundantly clear and needs no further elaboration.

Whether or not the offense involved a vulnerable victim, obviously coal miners in underground coal mines must rely upon the integrity of the system, itself, to protect them from this kind of occurrence, and it is primarily self-reporting, although there is an examination process. I find that they were vulnerable victims.

> "Any prior criminal record of an individual within the organization, high-level personnel of the organization or high-level personnel of a unit of the organization who participated in, condoned, or was willfully ignorant of the criminal conduct."

I sentenced the superintendent, and I recall that he had, and it was astounding to the Court, that he had been involved in nearly 400 infractions.

Now, I grant you that many of those were probably trifling regulatory violations, but as I noted at that time, many of them probably were not. Yet he was the superintendent at this mine site, and this mine site had been maintained, irrespective of whatever company, over a period of time by someone from JAD.

The probation report indicates before me that there are 1,233 violations by companies owned or operated by Mr. Dean and Mr. McAfee, another fact that I must take into account in setting a fine.

I assume that those go back to the 1980s. As the report indicates, many of these are probably trifling regulatory violations. Again, I assume that many are not. But I also must assume that it indicates some kind of an attitude about how business is to be conducted in the coal fields.

Looking to the other factors, it is clear to me that I must also look to the factors outlined in the statute. I have done that, as well.

The defendant's income earning capacity and financial resources, and I will address these under the next section, the burden the fine will impose upon the defendant, any pecuniary loss inflicted upon others as a result of the offense, whether the restitution is ordered and made, the amount of such restitution, and so on and so forth, and if the defendant is an organization, the size of the organization.

Many of these ring hollow in light of the fact that this company is in bankruptcy. But it is that fact in and of itself as indicative from the evidence that the Court has heard that the decision to place the defendant corporation in bankruptcy was a matter of expediency, not necessarily one that was required but one that was desired.

It is clear from financial information that I have reviewed that substantial funds were pumped into this company by JAD when it suited their interest, and they were withheld when it suited JAD's interest, and that the principals of JAD and J&T are substantially the same.

That fact being the case, I do not believe that it would be appropriate or required that the corporate veil be pierced. I do not, I do not think that Congress intended for such cumbersome procedures under circumstances such as this to be required.

I must make a reasoned decision based upon all the facts in the case that I have heard. I see no basis, given the conclusion that they pumped money in when necessary, and they closed it down when necessary, I see no basis for imposing a fine of less than 1.4 million dollars and then reducing that fine, as I am required to do, as indicated.

Accordingly, the Court will impose a total fine in this case of $1,078,713.20. Accordingly, it is the judgment of this Court -- I should ask, I don't know who I'm asking it to, because I don't know whether the Trustee should be here, or whether Mr. Dean should be here, but at this time I'm going to ask the corporation whether it has anything it would like to say through its designated representative before sentence is pronounced?

MR. STURGILL: Nothing, Your Honor.

THE COURT: It is the judgment of the Court, in accordance with the Sentencing Reform Act of 1984, and the sentencing guidelines as promulgated by the Sentencing Commission, that the defendant is hereby sentenced to a fine on count one of $200,000, to a fine on count three of $200,000, to a fine of $200,000 on count five, to a fine of $200,000 on count seven, and to a fine of $200,000 on count nine, to a fine of $78,713 on count 11. Each of these is cumulative. These fines are not concurrently imposed. For a total fine, as I have indicated, of $1,078,713.20.

Now, I direct that the clerk notify the United States Trustee in Bankruptcy of the decision reached by this Court, in addition to the lawyers that are here before the Court, counsel before the Court. I direct that the Trustee be notified of this decision by certified order.

/s/ 8/31/93
ENTERED

Clerk's Office U.S. Dist. Court
AT BIG STONE GAP, VA.
F I L E D
AUG 3 1 1993
JOYCE F. WITT, CLERK
By: /s/ L. B own
Deputy Clerk

AO 245 S (Rev. 4/90) Sheet 1 - Judgment in a Criminal Case

United States District Court
WESTERN District of VIRGINIA
BIG STONE GAP DIVISION

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

UNITED STATES OF AMERICA

v.

J & T COAL, INC. Case Number: 92-00061-01-B

(Name of Defendant)

William J. Sturgill, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☒ was found guilty on count(s) **1,3,5,7,9,11** after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
30:820(d)	**Willful Violations of MSHA Standards**	**Feb. 13, 1991**	**1,3,5, 7,9,11**

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

☐ Count(s) _____ (is) (are) dismissed on the motion of the United States.

XX It is ordered that the defendant shall pay a special assessment of $ 750.00, for count(s) 1,3,5,7,9,11, which shall be due [X] immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: _____

Defendant's Date of Birth: _____ August 30, 1993
Date of Imposition of Sentence

Defendant's Mailing Address:

/s/ Samuel G. Wilson
Signature of Judicial Officer

P.O. Box M
St. Charles, Virginia 24282

SAMUEL G. WILSON
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

Defendant's Residence Address:

Same

/s/ 8/31/93
Date

A TRUE COPY, TESTE:
JOYCE F. WITT, CLERK
BY: /s/ L. Brown
Deputy Clerk

AO 245 S (Rev. 4/90) Sheet 5 - Fine

Defendant: J&T Coal, Inc. Judgment – **Page 2 of 3**

Case Number: 92-61-B

FINE

The defendant shall pay a fine of **$ 1,078,713.00**. The fine includes any costs of incarceration and/ or supervision.

[x] This amount is the total of the fines imposed on individual counts, as follows:

Count 1: $200,000.00
Count 3: $200,000.00
Count 5: $200,000.00
Count 7: $200,000.00
Count 9: $200,000.00
Count 11: $ 78,713.00 The sentence imposed in each count is **NOT CONCURRENT.**

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[x] in full immediately.
[ ] in full not later than _____ .
[ ] in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

AO 245 S (Rev. 4/90) Sheet 7 - Fine

Defendant: J&T Coal, Inc. Judgment – **Page 3 of 3**.
Case Number: 92-61

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): **Each count of conviction is considered a separate group resulting in a five (5) level increase in the adjusted and total offense level.**

Guideline Range Determined by the Court:

Total Offense Level: **19**.
Criminal History Category: _____
Imprisonment Range: _____ to _____ months
Supervised Release Range: _____ to _____ years
Fine Range: $ **700,000** to $ **1,400,000**

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines. **N/A**

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): **N/A**

OR

The sentence departs from the guideline range **N/A**

- ☐ upon motion of the government, as a result of defendant's substantial assistance.
- ☐ for the following reason(s):

No. _____

UNITED STATES DISTRICT COURT

WESTERN District of VIRGINIA

ABINGDON Division

THE UNITED STATES OF AMERICA

vs.

J & T COAL, INC.
GARRY WILLIAMS, SR.

INDICTMENT

In violation of Title 30, United States Code, Sections 820(d)(c).

A true bill.

/s/ Jack W. Troutman
Asst. Foreman

Filed in open court this 16th day of December A.D. 19 92

/s/ E. Stokes
Clerk

Bail, $_____

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION
DECEMBER 1992 SESSION

UNITED STATES OF AMERICA	)	
v.	)	Criminal No. #92-61
J & T COAL, INC. and GARRY WILLIAMS, SR.	)	

INTRODUCTION

1. At all times relevant to this indictment J & T COAL, INC. is an "operator" of a coal mine as defined in Title 30, United States Code, Sections 802 (d) and (f) owned by Carl McAfee and Aubra P Dean.

2. Furthermore, at all times relevant to this indictment GARRY WILLIAMS, SR., J & T COAL, INC's mine superintendent, is an "agent" as defined in Title 30, United States Code, Section 802(e).

3. In order to protect the coal industry's "most precious resource - the miner" Congress enacted the Federal Mine Safety and Health Act of 1977 (referred to hereinafter as "the Act"). Pursuant to the Act, the Secretary of Labor, through his delegates, passed numerous mandatory health or safety standards [the standards relevant to this case are

found in Title 30, Code of Federal Regulation, Sections 75.202(a), 75.202(b), 75.203(a), 75.203(b), 75.220(a)(1) and 75.1200-2(b)] to which each operator of a coal mine must adhere. Pursuant to such mandatory regulations all coal operators must obtain and follow and authorized roof control plan while active mining operations continue.

4. On or about March 21, 1990, J & T COAL, INC.'s legal predecessor LJ's COAL, INC., obtained a roof control plan from the Mine Safety and Health Administration (MSHA) district manager. Pursuant to the roof control plan, J & T COAL, INC. was required to mine entries and crosscuts at 55 foot centers (in other words, leave 35 foot square coal blocks or pillars for roof support). The width of entries and crosscuts should have been no more than 20 feet wide, except where the proposed belt-track entry was to be placed, that entry could be 22 feet wide.

5. On or about February 7, 1991, while attempting to develop the 5th Left Panel off the North Mains of the 004 Section of J & T Coal Mine #1, J & T COAL, INC., through its agent, GARRY WILLIAMS, SR., "stayed on coal" by mining perpendicular to the projected 5th Left Panel. After "staying on coal" (mining in a perpendicular direction) for approximately one week J & T COAL, INC. began cutting back toward the North Mains where GARRY WILLIAMS, SR. intended to place a new belt-track entry.

6. Because of J & T COAL, INC's failure to use the "loop survey" or other comparable survey method, and because of J & T COAL, INC's failure to use proper directional sightlines, J & T COAL, INC. could not get the

belt-track equipment into the proposed entry because it was too narrow.

7. J & T COAL, INC. through its agent, GARRY WILLIAMS, SR., made a knowing and willful decision to shave ribs in order to get belt-track equipment into the proposed entry. In shaving ribs J & T COAL, INC. created an entry with widths ranging from 28 to 35 feet wide (6 to 13 feet in excess of the approved roof control plan) without providing any additional roof support or control (i.e. "cribbing" or timbering).

8. On or about February 13, 1991, at approximately 4:30 p.m., while the first shift of miners was changing with the second shift of miners, a roof fall or collapse, 115 feet in length, 28 to 35 feet in width and 3 to 15 feet, in thickness killed mining personnel. The individuals who were killed were the day and evening shift foremen, and the two day and evening shift roof bolters - Henry Wayne Mosley, Harold D. Dowell, Daniel E. Roberts and Floyd N. Varble, Jr., respectively.

9. This above introduction is incorporated by reference into each of the following twelve counts.

COUNT ONE

The Grand Jury charges:

1. That on or about February 13, 1991, in the Western Judicial District of Virginia, J & T COAL, INC., did through its agent - Garry Williams, Sr. - willfully violate a mandatory health or safety standard, to wit: the roof, face and ribs of areas where miners worked or

travelled were not adequately supported to protect the miners from hazards.

2. All in violation of Title 30, United States Code, Sections 820(d) and Title 30, Code of Federal Regulations, Section 75.202(a).

COUNT TWO

The Grand Jury charges:

1. That on or about February 13, 1991, in the Western Judicial District of Virginia, GARRY WILLIAMS, SR., the mine superintendent of J & T COAL, INC., did knowingly violate a mandatory health or safety standard, to wit: the roof, face and ribs of areas where miners worked or travelled were not adequately supported to protect the miners from hazards.

2. All in violation of Title 30, United States Code, Sections 820(d), 820(c) and Title 30, Code of Federal Regulations, Section 75.202(a).

COUNT THREE

The Grand Jury charges:

1. That on or about February 13, 1991, in the Western Judicial District of Virginia, J & T COAL, INC., did through its agent - Garry Williams, Sr. - willfully violate a mandatory health or safety standard, to wit: persons worked or travelled under unsupported roof.

2. All in violation of Title 30, United States Code, Sections 820(d) and Title 30, Code of Federal Regulations, Section 75.202(b).

COUNT FOUR

The Grand Jury charges:

1. That on or about February 13, 1991, in the Western Judicial District of Virginia, GARRY WILLIAMS, SR., the mine superintendent of J & T COAL, INC., did knowingly violate a mandatory health or safety standard, to wit: persons worked or travelled under unsupported roof.

2. All in violation of Title 30, United States Code, Sections 820(d), 820(c) and Title 30, Code of Federal Regulations, Section 75.202(b).

COUNT FIVE

The Grand Jury charges:

1. That on or about February 13, 1991, in the Western Judicial District of Virginia, J & T COAL, INC., did through its agent - Garry Williams Sr. - willfully violate a mandatory health or safety standard, to wit: mining in a manner which exposed miners to hazards caused by excessive widths of rooms, crosscuts and entries.

2. All in violation of Title 30, United States Code, Sections 820(d) and Title 30, Code of Federal Regulations, Section 75.203(a).

COUNT SIX

The Grand Jury charges:

1. That on or about February 13, 1991, in the Western Judicial District of Virginia, GARRY WILLIAMS, SR., the mine superintendent of J & T COAL, INC., did knowingly violate a mandatory health or safety standard, to wit: mining in a manner which exposed miners to hazards caused by excessive widths of rooms, crosscuts and entries.

2. All in violation of Title 30, United States Code, Sections 820(d), 820(c) and Title 30, Code of Federal Regulations, Section 75.203(a).

COUNT SEVEN

The Grand Jury charges:

1. That on or about February 13, 1991, in the Western Judicial District of Virginia, J & T COAL, INC., did through its agent - Garry Williams, Sr. - willfully violate a mandatory health or safety standard, to wit: failed to use a sightline or other method of directional control which would have maintained the projected direction of mining in entries, rooms and crosscuts.

2. All in violation of Title 30, United States Code, Sections 820(d); and Title 30, Code of Federal Regulations, Section 75.203(b).

COUNT EIGHT

The Grand Jury charges:

1. That on or about February 13, 1991, in the Western Judicial District of Virginia, GARRY WILLIAMS, SR., the mine superintendent of J & T COAL, INC., did knowingly violate a mandatory health or safety standard, to wit: failed to use a sightline or other method of directional control which would have maintained the projected direction of mining in entries, rooms and crosscuts.

2. All in violation of Title 30, United States Code, Sections 820(d), 820(c) and Title 30, Code of Federal Regulations, Section 75.203(b).

COUNT NINE

The Grand Jury charges:

1. That on or about February 13, 1991, in the Western Judicial District of Virginia, J & T COAL, INC., did through its agent - Garry Williams, Sr. - willfully violate a mandatory health or safety standard, to wit: failed to follow the March 21, 1990, approved roof control plan.

2. All in violation of Title 30, United States Code, Sections 820(d) and Title 30, Code of Federal Regulations, Section 75.220(a)(1).

COUNT TEN

The Grand Jury charges:

1. That on or about February 13, 1991, in the Western Judicial District of Virginia, GARRY WILLIAMS, SR., the mine superintendent of J & T COAL, INC., did knowingly violate a mandatory health or safety standard, to wit: failed to follow the March 21, 1990, approved roof control plan.

2. All in violation of Title 30, United States Code, Sections 820(d), 820(c) and Title 30, Code of Federal Regulations, Section 75.220(a)(1).

COUNT ELEVEN

The Grand Jury charges:

1. That on or about February 13, 1991, in the Western Judicial District of Virginia, J & T COAL, INC., did through its agent - Garry Williams Sr. - willfully violate a mandatory health or safety standard, to wit: failed to use the closed loop method or other equally accurate method of traversing a mine.

2. All in violation of Title 30, United States Code, Sections 820(d) and Title 30, Code of Federal Regulations, Section 75.1200-2(b).

COUNT TWELVE

The Grand Jury charges:

1. That on or about February 13, 1991, in the Western Judicial District of Virginia, GARRY WILLIAMS, SR., the mine superintendent of J & T COAL, INC., did knowingly violate a mandatory health or safety standard, to wit: failed to use the closed loop method or other equally accurate method of traversing a mine.

2. All in violation of Title 30, United States Code, Sections 820(d), 820(c) and Title 30, Code of Federal Regulations, Section 75.1200-2(b).

A true bill this 16 day of December, 1992.

s/s Jack W. Troutman
Asst. FOREMAN

/s/ E. Montgomery Tucker
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Docket No. 92-00061-01-B
	*	
J&T COAL, INC.,	*	
	*	
Defendant	*	

AFFIDAVIT

I, Robert Elam, having first duly sworn under oath, do hereby depose and say the following:

1. I am the Deputy Administrator for Coal Mine Safety and Health for the Mine Safety and Health Administration, United States Department of Labor, with offices at 4015 Wilson Boulevard, Room 832, Arlington, Virginia 22203, and am an authorized agent of the Plaintiff, through the Secretary of Labor. In 1991, I was the coordinator of accident investigations for the Coal Mine Safety and Health Division.

2. On February 13, 1991, a fatal roof fall accident occurred at the J & T No. 1 mine in St. Charles, Virginia. Based upon reasonable estimates, the following expenses were incurred by the Mine Safety and Health Administration (MSHA) and the Office of the Solicitor, United States Department of Labor, as a result of the mine and victim recovery efforts, the accident investigation, the

criminal investigation, civil penalty compliance, and legal expenses:

	Number of Man-Hours	Approximate Cost
Mine and victim recovery	368	$ 9,200
Accident investigation	4,000	$ 120,000
Criminal investigation	288	$ 8,640
Civil penalty compliance	220	$ 4,689
Legal expenses	640	$ 21,200

These figures were provided to me by MSHA and the Office of the Solicitor at the request of the United States Attorney's Office for the Western District of Virginia. The figures are a deliberately conservative estimate with the actual numbers being significantly higher. The reason for the conservative estimate is because of the short deadline in which to prepare this affidavit. For example, these figures do not include additional miscellaneous expenses incurred by MSHA and the Office of the Solicitor, such as employee benefits, travel expenses, transcripts, copying, and the personnel costs of upper-level managers who were involved in reviewing the various investigations and processes.

/s/ Robert Elam
Robert Elam
Deputy Administrator for Coal
Mine Safety and Health

Subscribed and sworn before me this 25th day of February, 1993.

/s/ Catherine L. Falatko
Notary Public

My Commission Expires: October 31, 1995

CONSTITUTION

AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

RULES OF CRIMINAL PROCEDURE

Rule 32(c)(3)(D)

If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

30 USCS § 820(a) and (d) (1990)

(a) Civil penalties for violations of mandatory health or safety standards; each violation separate offense. The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(d) Willful violations or refusal to comply with health and safety standards by operators of mines. Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 104 and section 107 [30 USCS §§ 814, 817], or any order incorporated in a final decision issued under this title [30 USCS §§ 811 et seq.], except an order incorporated in a decision under subsection (a) or section 105(c) [30 USCS § 815(c)], shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this Act, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or both.

§ 75.202 Protection from falls of roof, face and ribs.

(a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

(b) No person shall work or travel under unsupported roof unless in accordance with this subpart.

§ 75.203 Mining methods.

(a) The method of mining shall not expose any person to hazards caused by excessive widths of rooms, crosscuts and entries, or faulty pillar recovery methods. Pillar dimensions shall be compatible with effective control of the roof, face and ribs and coal or rock bursts.

(b) A sightline or other method of directional control shall be used to maintain the projected direction of mining in entries, rooms, crosscuts and pillar splits.

§ 75.220 Roof control plan.

(a)(1) Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

§ 75-1200-2 Accuracy and scale of mine maps.

(b) Mine Traverses shall be advanced by closed loop methods of traversing or other equally accurate methods of traversing.

18 USCS § 3553

§ 3553. Imposition of a sentence

(a) **Factors to be considered in imposing a sentence.** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider -

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed -

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of

defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) **Application of guidelines in imposing a sentence.** The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines

applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) **Statement of reasons for imposing a sentence.** The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence -

> (1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
>
> (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

18 USCS

§ 3572. Imposition of a sentence of fine and related matters

(a) Factors to be considered. In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a) -

(1) the defendant's income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense;

(6) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(7) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

(b) Fine not to impair ability to make restitution. If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.

SENTENCING GUIDELINES

§3D1.2 Groups of Closely-Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.2, 2B1.3,
2B4.1, 2B5.1, 2B5.2, 2B5.3,
2B5.4, 2B6,1;
§§2C1.1, 2C1.2, 2C1.7;
§§2D1.1, 2D1.2, 2D1.5,
2D1.11, 2D1.13;
§§2E4.1, 2E5.1, 2E5.2, 2E5.4,
2E5.6;
§§2F1.1, 2F1.2;
§2K2.1;
§2N3.1;
§2R1.1;
§§2S1.1, 2S1.2, 2S1.3;
§§2T1.1, 2T1.2, 2T1.3, 2T1.4,
2T1.6, 2T1.7, 2T1.9, 2T2.1,
2T3.1, 2T3.2.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two,
Part A;
§§2B2.1, 2B2.2, 2B2.3;
2B3.1, 2B3.2, 2B3.3;
§§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E1.5; 2E2.1
§§2G1.1, 2G1.2, 2G2.1;
§§2H1.1, 2H1.2, 2H1.3,
2H1.4, 2H4.1;

§§2L1.1, 2L2.1, 2L2.2,
2L.2.3, 2L2.4, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1,
2M3.2, 2M3.3, 2M3.4, 2M3.5,
2M3.6, 2M3.7, 2M3.8, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

Commentary

Application Notes:

1. Subsections (a)-(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute mandates imposition of a consecutive sentence are excepted from application of the multiple court rules. See §3D1.1(b).

2. The term "victim" is not intended to include direct or secondary victims. Generally, there will be one person who is directly and most seriously affected

by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims (e.g., drug of immigration offenses, where society at large is the victim), the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related. Where one count, for example, involves unlawfully entering the United States and the other involves possession of fraudulent evidence of citizenship, the counts are grouped together because the societal interests harmed (the interests protected by laws governing immigration) are closely related. In contrast, where one count involves the sale of controlled substances and the other involves an immigration law violation,t he counts are not grouped together because different societal interests are harmed. Ambiguities should be resolved in accordance with the purpose of this section as stated in the lead paragraph, i.e., to identify and group "counts involving substantially the same harm."

3. Under subsection (a), counts are to be grouped together when they represent essentially a single injury or are part of a single criminal episode or transaction involving the same victim.

When one count charges an attempt to commit an offense and the other charges the commission of that offense, or when one count charges an offense based on a general prohibition and the other charges violation of a specific prohibition encompassed in the general prohibition, the counts will be grouped together under subsection (a).

Examples: (1) The defendant is convicted of forging and uttering the same check. The counts are to be grouped together. (2) The defendant is convicted of kidnapping and assaulting the victim during the course of the kidnapping. The counts are to be grouped together. (3) The defendant is convicted of bid rigging (an antitrust offense) and of mail fraud for signing and mailing a false statement that the bid was competitive. The counts are to be grouped together. (4) The defendant is convicted of two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent apprehension as part of a single criminal episode. The counts are to be grouped together. But: (6) The defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days. The counts are not to be grouped together. (7) The defendant is convicted of two counts, each for unlawfully bringing one alien into the United States, but on different occasions. The counts are not to be grouped together.

4. Subsection (b) provides that counts that are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim are to be grouped together, even if they constitute legally distinct offense occurring at different times. This provision does not authorize the grouping of offenses that cannot be considered to represent essentially one composite harm (e.g., robbery of the same victim on different occasions involves multiple, separate instances of fear and risk of harm, not one composite harm).

When one count charges a conspiracy or solicitation and the other charges a substantive offense that was the sole object of the conspiracy or solicitation, the counts will be grouped together under subsection (b).

Examples: (1) The defendant is convicted of one count of conspiracy to commit extortion and one count of extortion for the offense he conspired to commit. The counts are to be grouped together. (2) The defendant is convicted of two counts of mail fraud and one count of wire fraud, each in furtherance of a single fraudulent scheme. The counts are to be grouped together, even if the mailings and telephone call occurred on different days. (3) The defendant is convicted of one count of auto theft and one count of altering the vehicle identification number of the care he stole. The counts are to be grouped together. (4) The defendant is convicted of two counts of distributing a controlled substance, each count involving a separate sale of 10 grams of cocaine that is part of a common scheme or plan. In addition, a finding is made that there are two other sales, also part of the common scheme or plan, each involving 10 grams of cocaine. The total amount of all four sales (40 grams of cocaine) will be used to determine the offense level for each count under §1B1.3(a)(2). The two counts will then be grouped together under either this subsection or subsection (d) to avoid double counting. But: (5) The defendant is convicted of two counts of rape for raping the same person on different days. The counts are not to be grouped together.

5. Subsection (c) provides that when conduct that represents a separate count, e.g., bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision presents "double counting" of offense behavior. Of course, this rule applies only if the offenses are closely related. It is not, for example the intent of this rule that (assuming they could be joined together) a bank robbery on one occasion and an assault resulting in bodily injury on another occasion be grouped together. The bodily injury (the harm from the assault) would not be a specific offense together. The bodily injury (the harm from the assault) would not be a specific offense characteristic to the robbery and would represent a different harm. On the other hand, use of a firearm in a bank robbery and unlawful possession of that firearm are sufficiently related to a warrant grouping of counts under this subsection. Frequently, this provision will overlap subsection (a), at least with respect to specific offense characteristics. However, a count such as obstruction of justice, which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c) even though it is not covered by subsection (a).

Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guideline for the more serious count provides an adjustment for only one occurrence of that factor. In such cases, only

the count representing the most serious of those factors is to be grouped with the other count. For example, if in a robbery of a credit union on a military base the defendant is also convicted of assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault conviction would be treated separately.

A cross reference to another offense guideline does not constitute "a specific offense characteristic. . . or other adjustments" within the meaning of subsection (c). For example, the guideline for bribery of a public official contains a cross reference to the guideline for a conspiracy to commit the offense that the bribe was to facilitate. Nonetheless, if the defendant were convicted of one count of securities fraud and one count of bribing a public official to facilitate the fraud, the two counts would not be grouped together by virtue of the cross reference. If, however, the bribe was given for the purpose of hampering a criminal investigation into the offense, it would constitute obstruction and under §3C1.1 would result in a 2-level enhancement to the offense level for the fraud. Under the latter circumstances, the counts would be grouped together.

6. Subsection (d) likely will be used with the greatest frequency. It provides that most property crime (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together. The list of instances in which

this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (d).

A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d).

Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; see §3D1.3(b). The "same general type" of offense is to be construed broadly, and would include, for example, larceny, embezzlement, forgery, and fraud.

Examples: (1) The defendant is convicted of five counts of embezzling money from a bank. the five counts are to be grouped together. (2) The defendant is convicted of two counts of theft of social security checks and three counts of theft from the mail, each from a different victim. All five counts are to be grouped together. (3) The defendant is convicted of five counts of mail fraud and ten counts of wire fraud. Although the counts arise from various schemes, each involved a monetary objective. All fifteen counts are to be grouped together. (4) The defendant is convicted of three counts of unlicensed dealing in firearms. All three counts are to be grouped together. (5) The

defendant is convicted of one count of selling heroin, one count of selling PCP, and one count of selling cocaine. The counts are to be grouped together. The Commentary to §2D1.1 provides rules for combining (adding) quantities of different drugs to determine a single combined offense level. (6) The defendant is convicted of three counts of tax evasion. The counts are to be grouped together. (7) The defendant is convicted of three counts of discharging toxic substances from a single facility. The counts are to be grouped together. (8) The defendant is convicted on two counts of check forgery and one count of uttering the first of the forged checks. All three counts are to be grouped together. Note, however, that the uttering count is first grouped with the first forgery count under subsection (a) of this guideline, so that the monetary amount of that check counts only once when the rule in §3D1.3(b) is applied. But: (9) The defendant is convicted of three counts of bank robbery. The counts are not to be grouped together, nor are the amounts of money involved to be added.

7. A single case may result in application of several of the rules in this section. Thus, for example, example (8) in the discussion of subsection (d) involves an application of §3D1.2(a) followed by an application of §3D1.2(d). Note also that a Group may consist of a single count, conversely, all counts may form a single Group.

8. A defendant may be convicted of conspiring to commit several substantive offenses and also of committing one or more of the substantive offense. In such cases, treat the conspiracy count as if it

were several counts, each charging conspiracy to commit one of the substantive offenses. See §1B1.2(d) and accompanying commentary. Then apply the ordinary grouping rules to determine the combined offense level based upon the substantive counts of which the defendant is convicted and the various acts cited by the conspiracy count that would constitute behavior of a substantive nature. Example: The defendant is convicted of two counts: conspiring to commit offenses A, B, and C, and committing offense A. Treat this as if the defendant was convicted of (1) committing offense A; (2) conspiracy to commit offense A; (3) conspiracy to commit offense B; and (4) conspiracy to commit offense C. Count (1) and count (2) are grouped together under §3D1.2(b). Group the remaining counts, including the various acts cited by the conspiracy count that would constitute behavior of a substantive nature, according to the rules in this section.

Background: Ordinarily, the first step in determining the combined offense level in a case involving multiple counts is to identify those counts that are sufficiently related to be placed in the same Group of Closely Related Counts ("Group). This section specifies four situations in which counts are to be grouped together. Although it appears last for conceptual reasons, subsection (d) probably will be used most frequently.

A primary consideration in this section is whether the offenses involve different victims. For example, a defendant may stab three prison guards in a single escape attempt. Some would argue that all counts arising out of a single transaction or occurrence should be grouped together

even when there are distinct victims. although such a proposal was considered, it was rejected because if probably would require departure in many cases in order to capture adequately the criminal behavior. Cases involving injury to distinct victims are sufficiently comparable, whether or not the injuries are inflicted in distinct transactions, so that each such count should be treated separately rather than grouped together. Counts involving different victims (or societal harms in the case of "victimless" crimes) are grouped together only as provided in subsection (c) or (d).

Even if counts involve a single victim, the decision as to whether to group them together may not always be clear cut. For example, how contemporaneous must two assaults on the same victim be in order to warrant grouping together as constitution a single transaction or occurrence? Existing case law may provide some guidance as to that constitutes distinct offenses, but such decisions often turn on the technical language of the statute and cannot be controlling. In interpreting this Part and resolving ambiguities, the court should look to the underlying policy of this Part as stated in the Introductory Commentary.

Historical Note: Effective November 1, 1989. Amended effective June 15, 1988 (see Appendix C, amendment 45); November 1, 1989 (see Appendix C. amendments 121, 253-256, and 303); November 1, 1990 (see Appendix C. amendments 309, 348, and 349); November 1, 1991 (see Appendix C. amendment 417).

§3D1.4. **Determining the Combined Offense Level**

The combined offense level is determine by taking the offense level applicable to the Group with the highest offense level and increasing that offense level by the amount indicated in the following table.

Number of Units	Increase in Offense Level
1	none
1 1/2	add 1 level
2	add 2 levels
2 1/2 - 3	add 3 levels
3 1/2 - 5	add 4 levels
More than 5	add 5 levels.

In determining the number of Units for purposes of this section:

(a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from 1 to 4 levels less serious.

(b) Count as one-half Unit any Group that is 5 to 8 levels less serious than the Group with the highest offense level.

(c) Disregard any Group that is 9 of more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

Commentary

Application Note:

1. Application of the rules in §§3D1.2 and 3D1.3 may produce a single Group of Closely Related Counts. In such cases, the combined offense level is the level corresponding to the Group determine in accordance with §3D1.3.

2. The procedure for calculating the combined offense level when there is more than one Group of Closely Related Counts is as follows: First, identify the offense level applicable to the most serious Group; assign it one Unit. Next, determine the number of Units that the remaining Groups represent. Finally, increase the offense level for the most serious Group by the number of levels indicated in the table corresponding to the total number of Units.

Background: When Groups are of roughly comparable seriousness, each Group will represent one Unit. When the most serious Group carries an offense level substantially higher than that applicable to the other Groups, however, counting the lesser Groups fully for purposes of the table could add excessive punishment, possibly even more than those offenses would carry if prosecuted separately. To avoid this anomalous result and produce declining marginal punishment, Groups 9 or more levels less serious than the most serious Group should not be counted for purposes of the table, and that Groups 5 to 8 levels less serious should be treated as equal to one-half of a Group. Thus, if the most serious Group is at offense level 15 and if two other Groups are at level 10, there would be a total of two Units for purposes of the table (one plus one-half plus one-half)

and the combined offense level would be 17. Inasmuch as the maximum increase provided in the guideline is 5 levels, departure would be warranted in the unusual case where the additional offenses resulted in a total of significantly more than 5 Units.

In unusual circumstances, the approach adopted in this section could produce adjustments for the additional counts that are inadequate or excessive. If there are several groups and the most serious offense is considerably more serious than all of the other, there will be no increase in the offense level resulting from the additional counts. Ordinarily, the court will have latitude to impose added punishment by sentencing toward the upper end of the range authorized for the most serious offense. Situations in which there will be inadequate scope for ensuring appropriate additional punishment for the additional crimes are likely to be unusual and can be handled by departure from the guidelines. Conversely, it is possible that if there are several minor offenses that are not grouped together, application of the rules in this Part could result in an excessive increase in the sentence range. Again, such situations should be infrequent and can be handled through departure. An alternative method for ensuring more precise adjustments would have been to determine the appropriate offense level adjustment through a more complicated mathematical formula; that approach was not adopted because of its complexity.

§8C2.2 Preliminary Determination of Inability to Pay Fine

(a) Where it is readily ascertainable that the organization cannot and is not likely to become able (even on an installment schedule) to pay restitution required under §8B1.1 (Restitution - Organizations), a determination of the guideline fine range is unnecessary because, pursuant to §8C3.3(a), no fine would be imposed.

(b) Where it is readily ascertainable through a preliminary determination of the minimum of the guideline fine range (see §§8C2.3 through 8C2.7) that the organization cannot and is not likely to become able (even on an installment schedule) to pay such minimum guideline fine, a further determination of the guideline fine range is unnecessary. Instead, the court may use the preliminary determination and impose the fine that would result from the application of §8C3.3 (Reduction of Fine Based on Inability to Pay).

Commentary

Application Notes:

1. In a case of a determination under subsection (a), a statement that "the guideline fine range was not determined because it is readily ascertainable that the defendant cannot and is not likely to become able to pay restitution" is recommended.

2. In a case of a determination under subsection (b), a statement that "no precise determination of the guideline fine range is required because it is readily ascertainable that the defendant cannot and is not likely to become able to pay the minimum of the guideline fine range" is recommended.

Background: Many organizational defendants lack the ability to pay restitution. In addition, many organizational defendants who may be able to pay restitution lack the ability to pay the minimum fine called for by §8C2.7(a). In such cases, a complete determination of the guideline fine range may be a needless exercise. This section provides for an abbreviated determination of the guideline fine range that can be applied where it is readily ascertainable that the fine within the guideline fine range determined under §8C2.7 (Guideline Fine Range - Organizations) would be reduced under §8C3.3 (Reduction of Fine Based on Inability to Pay).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 422).

§8C2.4 Base Fine

(a) The base fine is the greatest of:

(1) the amount from the table in subsection (d) below corresponding to the offense level determined under §8C2.3 (Offense Level); or

(2) the pecuniary gain to the organization from the offense; or

(3) the pecuniary loss from the offense caused by the organization, to the extent the loss was caused intentionally, knowingly, or recklessly.

(b) Provided, that if the applicable offense guideline in Chapter Two includes a special instruction for organizational fines, that special instruction shall be applied as appropriate.

(c) Provided, further, that to the extent the calculation of either pecuniary gain or pecuniary loss would unduly complicate or prolong the sentencing process, that amount, i.e., gain or loss as appropriate, shall not be used for the determination of the base fine.

(d) Offense Level Fine Table

Offense Level	Amount
6 or less	$5,000
7	$7,500
8	$10,000
9	$15,000
10	$20,000
11	$30,000
12	$40,000
13	$60,000
14	$85,000
15	$125,000
16	$175,000
17	$250,000
18	$350,000
19	$500,000
20	$650,000
21	$910,000
22	$1,200,000
23	$1,600,000
24	$2,100,000
25	$2,800,000
26	$3,700,000

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In the Supreme Court of the United States

OCTOBER TERM, 1995

J & T COAL, INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause barred petitioner's conviction and sentencing for criminal violations of federal mine safety standards after petitioner had been assessed civil sanctions for violations of the same standards.

2. Whether the district court made findings adequate to support its determination that petitioner had the ability to pay a fine.

3. Whether the district court correctly declined to "group" petitioner's offenses under Sentencing Guidelines § 3D1.2.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-326

J & T COAL, INCORPORATED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is unpublished, but the judgment is noted at 56 F.3d 63 (Table). The opinion of the district court denying petitioner's motion to dismiss the indictment (Pet. App. A15-A22) is reported at 818 F. Supp. 925.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1995. The petition for a writ of certiorari was filed on August 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted on six counts of willfully violating federal mine safety standards, in violation of 30 U.S.C. 820(d) and 30 C.F.R. 75.202(b). Petitioner was fined $1,078,713. The court of appeals affirmed. Pet. App. A1-A14.

1. On February 13, 1991, the roof collapsed in a coal mine operated by petitioner, killing four miners. Pet. App. A3-A4; see Gov't C.A. Br. 6-7. Evidence at trial established that the roof collapse followed several days in which petitioner's employees committed knowing and willful violations of federal mine safety standards. Pet. App. A3.

Petitioner was incorporated by Carl McAfee and Aubra Paul Dean in Virginia in 1980 with $1,000 of capital in the form of a loan receivable. Petitioner leased all of its equipment from, and sold all of its coal to, JAD Coal, another corporation owned largely by McAfee and Dean, although petitioner's books showed no lease expenses paid to or accounts receivable from JAD Coal. In 1990, after ten years of mining, petitioner's retained earnings were $664. Pet. App. A4; Gov't C.A. Br. 7-8.

2. After an investigation of the roof collapse by the federal Mine Safety and Health Administration and the Virginia Department of Mines, Minerals and Energy, the Federal Mines Safety and Health Review Commission assessed $300,000 in civil sanctions against petitioner pursuant to 30 U.S.C. 820(a) (Supp. V 1993). On April 6, 1992, an administrative law judge entered a default decision requiring petitioner to pay the assessment. Petitioner failed to pay the

assessment, and on July 20, 1992, the United States initiated a civil action to collect the assessment. On February 4, 1993, the district court entered judgment for the United States in that action. As of the date of the court of appeals' decision, petitioner had not paid the bulk of the assessment or satisfied the judgment. Pet. App. A2; Gov't C.A. Br. 2.

3. Before trial on the criminal charges, petitioner moved to dismiss the indictment, alleging that the Double Jeopardy Clause barred its conviction and sentencing on criminal charges resting on the mine collapse after the assessment of civil penalties in connection with the same incident. The district court denied the motion. Pet. App. A15-A22. It found no evidence that Congress intended sanctions under 30 U.S.C. 820(a) to serve a retributive or deterrent purpose and concluded that "civil penalties under § 820(a) may just as easily be said to promote the remedial goals of mine safety and reimbursement for the government's expenditures in connection with the underlying acts." Pet. App. A21 (citation omitted). In addition, the court noted that the government had shown that its costs in investigating the mine accident and pursuing sanctions amounted to at least $163,729, and it found that the assessment of $300,000 "'approximate[d] the Government's damages and actual costs.'" *Ibid.* (quoting *United States* v. *Halper*, 490 U.S. 435, 446 (1989)). The court accordingly concluded that the civil sanction imposed by federal mining authorities did not constitute "punishment" and that petitioner's conviction and sentencing on the indictment would not constitute a second punishment for the same offense, in violation of the Double Jeopardy Clause.

Petitioner was convicted. At sentencing, the district court determined that there was no sentencing guideline applicable to violations of 30 U.S.C. 820(d). The court found, however, that petitioner's offenses resulted in four counts of involuntary manslaughter. Pursuant to 18 U.S.C. 3553(b) and § 2X5.1, United States Sentencing Commission, *Guidelines Manual* (Guidelines), it therefore selected Guidelines § 2A1.4, the guideline for that offense, as the most analogous guideline. Pet. App. A10-A11. Using that guideline, the court found that petitioner's actions were reckless and set its offense level at 14. Under Guidelines § 3D1.2, a court is required to "group" offenses involving "substantially the same harm." Offenses that are grouped have a lower aggregate offense level than offenses that are not grouped. See Guidelines § 3D1.4. Guidelines § 3D1.2 provides, however, a court may not group offenses falling under Guidelines § 2A. Thus, based on its selection of Guidelines § 2A1.4 as the most analogous guideline, the court declined to "group" petitioner's offenses under Guidelines § 3D1.2. As a result, petitioner's offense level rose to 19. Pet. App. A10-A12.

Approximately three months before sentencing, petitioner had filed for bankruptcy under Chapter 7 of the bankruptcy code. At sentencing, the court held two days of hearings on the question whether petitioner had the ability to pay a fine, and found that petitioner filed for bankruptcy as "a matter of expediency." Based on the financial relationship between petitioner and JAD Coal, the court considered JAD Coal's assets in determining whether petitioner had the ability to pay a fine. The court imposed a fine of $1,400,000, which it reduced by the amount of the civil

assessments already imposed against petitioner for a total fine of $1,078,713.20. Pet. App. A31-A33, A37.

4. The court of appeals affirmed. Pet. App. A1-A14. The court first rejected petitioner's contention that its conviction and sentence violated the Double Jeopardy Clause. The court concluded that 30 U.S.C. 820(a), the civil penalties provision, and 30 U.S.C. 820(d), the criminal provision, satisfied the *Blockburger* test for determining whether two statutes impose punishment for the "same offense" within the meaning of the Double Jeopardy Clause. See *Blockburger* v. *United States*, 284 U.S. 299 (1932). The court reasoned that Section 820(d) requires proof of an element, willfulness, not required by Section 820(a). Pet. App. A5-A6. In addition, the court held that the $300,000 civil assessment against petitioner was "reasonable and remedial" and thus "did not cross the line into the forbidden area of punishment." *Id.* at A7-A8. Because the civil sanction was "remedial in nature, * * * there [was] no violation of the double jeopardy clause." *Id.* at A8.

The court also held that the district court had not erred in sentencing petitioner. The court agreed with the district court that the involuntary manslaughter guideline provided the most analogous offense guideline to petitioner's offense and that petitioner's offenses should not be grouped under Guidelines § 3D1.2. The court also found that the district court had made sufficient findings of fact concerning petitioner's ability to pay. In so holding, the court rejected petitioner's contention that the district court should have determined whether there was sufficient evidence to pierce petitioner's corporate veil and hold JAD Coal liable for the fine. The court of appeals concluded that "Congress did not

intend for district courts to engage in such cumbersome proceedings as piercing a corporate veil before arriving at an appropriate fine or sentence. This is particularly true when a corporation, such as [petitioner], has been put into bankruptcy in an obvious effort to avoid payment of any fine." Pet. App. A13.

ARGUMENT

1. Petitioner renews its contention (Pet. 9-20) that its conviction and punishment in the criminal case violated the Double Jeopardy Clause. In particular, petitioner asserts that the civil assessments imposed by the federal mining authorities and subsequently reduced to judgment in the civil action against petitioner contained a "punitive component" and thus imposed punishment for the safety violations that later formed the basis for its conviction. While we believe that petitioner's double jeopardy claim does not warrant review, the Court may wish to hold the petition pending disposition of the government's petitions for a writ of certiorari in *United States* v. *Ursery*, No. 95-345 (filed Aug. 28, 1995), and *United States* v. *$405,089.23*, No. 95-346 (filed Aug. 28, 1995).

a. In *United States* v. *Halper*, 490 U.S. 435 (1989), this Court held that after imposition of a criminal punishment, the "multiple punishments" component of the Double Jeopardy Clause bars imposition of a civil penalty that is "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 442. In explaining this conclusion, the Court stressed that the government "is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being

deemed to have imposed a second punishment for the purpose of double jeopardy analysis." *Id.* at 446. The *Halper* Court also cautioned that it was announcing "a rule for the rare case, the case such as the one before [it], where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449.

Halper makes clear that a particular civil sanction following a criminal prosecution is not punitive under the Double Jeopardy Clause when it is reasonably calculated to make the government whole. As the *Halper* Court explained, a court confronting a claim that a civil sanction is punitive must determine the point at which "a civil sanction has accomplished its remedial purpose of making the Government whole [and] beyond which the sanction takes on the quality of punishment." 490 U.S. at 449. A sanction reaches that point only when it is not rationally related to the harm caused by the defendant's conduct or when it is "overwhelmingly disproportionate" to the damages caused. In *Halper*, for example, the defendant was subjected to a civil penalty of $130,000, which was "exponentially greater than the amount of the fraud [$585], and * * * also many times the amount of the Government's total loss [$16,000]." *Id.* at 445.

Petitioner's claim fails under *Halper* for a number of reasons. To begin with, the district court reduced petitioner's fine in the criminal case by the amount of the civil assessments. In *Halper*, after finding that the civil sanction imposed on the defendant was punitive, the Court remanded for further proceedings, suggesting that a second sanction would be barred only to the extent that it was punitive. *Halper*, 490 U.S. at 449-450, 452. Other decisions of this Court

support the proposition that double jeopardy violations, like other constitutional violations, must be remedied only to the extent of the injury suffered. See *Jones* v. *Thomas*, 491 U.S. 376, 380-387 (1989); *Morris* v. *Mathews*, 475 U.S. 237, 244-247 (1986); compare *Ohio* v. *Johnson*, 467 U.S. 493, 499 (1984) (noting that when a defendant "is retried following conviction, the * * * protection [against multiple-punishments] ensures that after a subsequent conviction a defendant receives credit for time already served"). Here, at most, petitioner suffered a violation of the Double Jeopardy Clause only to the extent that the fine imposed in a criminal case was cumulative of the civil assessment. Because the district court reduced the fine by the amount of the assessment, the fine was not cumulative and did not violate the multiple punishments prong of the Double Jeopardy Clause.

Moreover, *Halper* holds that a civil assessment qualifies as punishment only if it is "overwhelmingly disproportionate" to the government's costs and damages. In this case, the government's investigation of the fatal mine collapse cost more than $160,000. The civil assessment of $300,000 is not overwhelmingly disproportionate to that amount. Indeed, *Halper* stated that the government may ordinarily seek liquidated damages plus double damages without imposing punishment in a civil proceeding. 490 U.S. at 446. The civil assessment in this case is less than twice the government's costs. See *United States* v. *Barnette*, 10 F.3d 1553 (11th Cir.) (civil damages of $50 million would not impose punishment on defendant when the government suffered at least $15 million in losses from the defendant's conduct), cert. denied, 115 S. Ct. 74 (1994); *United States* v. *Furlett*, 974 F.2d 839,

843-844 (7th Cir. 1992) ($75,000 fine not so disproportionate to the government's cost of investigating the defendants' fraud, even though the government submitted an affidavit that only outlined the number of hours involved in, and not the actual cost of the investigation).

Petitioner appears to concede that under *Halper*, the civil assessment did not constitute punishment if it bore a rational relation to the government's costs and damages. Petitioner asserts (Pet. 15-16), however, that when the government's costs and damages are known, a civil assessment that exceeds those costs is not remedial. The government's costs and damages were known or ascertainable in *Halper*, however, and that fact did not preclude the Court from stating that the government could seek to impose a civil assessment that was more than twice those costs and damages. In any event, petitioner ignores the fact that the conduct that caused the mine collapse continues to generate costs to the government, including those occasioned by petitioner's criminal prosecution, litigation traceable to petitioner's bankruptcy filing, and continuing efforts to collect the civil assessment, which petitioner has shown no intention of paying since that filing. Thus, even accepting petitioner's contention that a civil assessment cannot substantially exceed the government's known costs, petitioner is not entitled to relief.[1]

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[1] Petitioner also argues (Pet. 16-20) that the court of appeals erred in finding that the criminal prosecution does not rest on the "same offense" as the prior civil assessment. We agree that the court of appeals appears to have erred in that respect. The court correctly noted that the criminal prosecution required proof of an element, willfulness, that the government was not required to prove to impose the civil assessment. That

b. Petitioner also asserts (Pet. 12-14) that the court of appeals' decision conflicts with *United States* v. *Hudson*, 14 F.3d 536 (10th Cir. 1994), and *United States* v. *$405,089.23*, 33 F.3d 1210 (9th Cir. 1994), petition for cert. pending, No. 95-346 (filed Aug. 28, 1995). Neither decision conflicts with the court of appeals' rejection of petitioner's double jeopardy claim. In *Hudson*, the Tenth Circuit simply remanded for the district court to determine whether a monetary assessment imposed by an administrative agency was remedial under the *Halper* test. In *$405,089.23*, the Ninth Circuit held that a forfeiture of drug proceeds under 21 U.S.C. 881(a)(6) always constitutes punishment, but it did not purport to reject the *Halper* proportionality analysis for other kinds of civil sanctions.

Petitioner suggests (Pet. 6, 12) that this Court's decision in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), which determined that certain civil forfeitures amount to "punishment" for purposes of the Excessive Fines Clause of the Eighth Amendment, calls for a different analysis of the double jeopardy question, as the Ninth Circuit concluded in *$405,089.23*, *supra*. It is doubtful that if *Austin* were so read it would have any application outside the context of sanctions imposed under civil forfeiture statutes, which the *Austin* Court viewed as having a unique history and function. See 113 S. Ct. at 2806-2812. Nonetheless,

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additional mental element, however, does not make the civil violation a different "offense" if all of its elements are included in the criminal violation. See, *e.g.*, *Brown* v. *Ohio*, 432 U.S. 161, 167-168 (1977); cf. *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993). Because the validity of petitioner's conviction is not affected by the court of appeals' error, further review of the "same offense" determination is not warranted.

the extent (if any) to which *Austin* should be read to change established double jeopardy doctrine with respect to civil forfeitures is before the Court in *$405,089.23*, *supra*, and *Ursery*, *supra*, and the Court's resolution of that question might affect the proper disposition of the petition in this case. For that reason, the Court may wish to hold the petition in this case pending its disposition of the government's petitions in *$405,089.23*, *supra*, and *Ursery*, *supra*.

2. Petitioner next contends (Pet. 20-27) that the district court failed to make findings adequate to support its imposition of a $1,078,713 fine on petitioner. In particular, petitioner asserts that the court failed to justify its decision to consider the assets of a related corporation, JAD Coal, in determining whether petitioner had the ability to pay a fine. That fact-bound claim does not warrant review.

Federal Rule of Criminal Procedure 32(c)(1) requires the district court at sentencing to "rule on any unresolved objections to the presentence report. * * * For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing."[2] Here, petitioner claimed that it lacked the ability to pay a fine. The district court held two days of hearings at which, as petitioner acknowledges (Pet. 22), "the prosecution put on extensive evidence" of JAD Coal's relationship with petitioner as it affected petitioner's ability to

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[2] Petitioner relies (Pet. 20; Pet. App. A54) on a version of Rule 32 that was superseded on November 1, 1987. Although the Rule has been reorganized, however, its substance has not materially changed in any way relevant to this case.

pay a fine. After that hearing, the district court rejected petitioner's contention. Specifically, the court noted that petitioner had filed for bankruptcy as "a matter of expediency," that "substantial funds were pumped into [petitioner] by JAD," and that the principals of JAD Coal and petitioner "are substantially the same." Then, "based upon all the facts in the case," the court held that there was "no basis for imposing a fine of less than $1.4 million." In short, as the court of appeals held, "[t]he findings of the district court were sufficiently specific on the issue of [petitioner's] ability to pay the fine and the connection between [petitioner] and JAD to comply with" Rule 32.[3]

3. Finally, petitioner asserts (Pet. 28-29) that the district court erred in declining to "group" its offenses under the Sentencing Guidelines. Petitioner

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[3] Petitioner also asserts that "[i]t defies fundamental concepts of fairness and due process for the trial court to assess *J&T's* fine based on *JAD's* assets," and that "there is no evidence of record that [petitioner] could possibly pay" the fine. Pet. 25. Those contentions overlook fundamental principles of federal sentencing law. First, it is the *defendant's* burden to prove inability to pay a fine. See, *e.g.*, *United States* v. *Gomez*, 24 F.3d 924, 926-927 (7th Cir.), cert. denied, 115 S. Ct. 280 (1994). Petitioner failed to persuade the trier of fact on an issue on which it carried the burden of persuasion. Second, there is nothing unfair in the district court's consideration of resources that may be available to a closely-held company from related companies or individuals. If the shoe were on the other foot, a corporate defendant in petitioner's position could demand credit toward its fine for any criminal fines already paid by its shareholders, even in the absence of an alter-ego relationship. See Guidelines § 8C3.4, Background Note (providing for credit based on the presumption that "[f]or practical purposes, most closely held organizations are the alter egos of their owner-managers").

does not appear to contest, however, the district court's determination that there is no sentencing guideline for its offense of conviction or the court's selection of Guidelines § 2A1.4 as the guideline for the offense most analogous to the offense of conviction. Guidelines § 3D1.2, which governs the "grouping" of offenses, expressly provides that "all offenses under Chapter Two, Part A" of the Guidelines should not be grouped. There is accordingly no merit to petitioner's claim.[4] In any event, even if petitioner were correct in its submission that the lower courts need further guidance on the proper application of the grouping Guidelines, that would be a matter for the Sentencing Commission, not this Court. See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991).

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[4] Petitioner also contends that the district court erred in adding five levels, instead of three, to its offense level even if that court was correct in declining to group the offenses. Petitioner did not raise that claim in the district court, see Gov't C.A. Br. 24, and the court of appeals did not discuss it. Because the court of appeals chose not to overlook petitioner's default in the district court by passing on that claim, it is not appropriately before this Court. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 42-43 (1992).

CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, with respect to the first question presented in the petition, the petition for a writ of certiorari should be held pending the disposition of the petitions for a writ of certiorari in *United States* v. *$405,089.23*, No. 95-346 (filed Aug. 28, 1995), and *United States* v. *Ursery*, No. 95-345 (filed Aug. 28, 1995).

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

J & T COAL, INCORPORATED,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY OF PETITIONER TO BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. 95-326

J&T COAL, INCORPORATED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER

ARGUMENT

I. THE CIRCUITS ARE CLEARLY SPLIT WITH RESPECT TO DOUBLE JEOPARDY PUNISHMENT ANALYSIS UNDER HALPER AND AUSTIN AND THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE CONFLICT.

Respondent essentially concedes that the Double Jeopardy issues raised in this petition merit review, but urges this Court, instead, to grant petitions it has filed

raising the same issues. United States v. Ursery, No. 95-345, and United States v. $405,089.23, No. 95-346. The fact that three petitions involving these same Constitutional questions were filed from the Fourth, Sixth and Ninth Circuits within the same week (August 24-28, 1995), speaks volumes as to the need for additional guidance from this Court on these matters.

Respondent's discussion of the Double Jeopardy issue graphically illustrates the existing uncertainty in this area, particularly with respect to the question of what constitutes "punishment" under United States v. Halper, 490 U.S. 435 (1989) and Austin v. United States, 125 L. Ed. 488 (1993). Those cases state:

> [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Halper, 490 U.S. at 448; see also Austin, 125 L. Ed. 2d at 498. Yet, respondent asserts that under Halper so-called "civil" fines many millions of dollars in excess of government costs can be dubbed "remedial." Br. in Opp. at page 8. Respondent's reliance on United States v. Barnett[1] only provides an additional log to the already burning dispute among the circuits regarding the

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[1]United States v. Barnett, 10 F.3d 1553 (11th Cir.) (cited for proposition that civil damages of $50 million would not impose punishment on defendant when the government suffered at least $15 million in losses from the defendant's conduct), cert. denied, 115 S. Ct. 74 (1994).

proper interpretation of "punishment" under Halper and Austin. See Petition at 13-14.

Certainly, respondent's emphasis on the district court's claim that the fines could "as easily be" classified remedial as punitive (Opp. Pet. at 3) does little to advance its position. This statement was made in the course of the district court's improper analysis of "Mendoza-Martinez factors"[2] (Pet. App. at 20-21) in an attempt to determine if the initial, $300,000 fine was punitive or remedial. The trial court made this statement relying on United States v. WRW Corp., 986 F.2d 138, 141 (6th Cir. 1993), which applied the same errant test. Thus, respondent merely highlights the confusion in the lower courts concerning the concept of "punishment" under Double Jeopardy analysis. As this Court stated in Austin, the Mendoza-Martinez factors do not address the question of whether punishment has been imposed (125 L. Ed. 2d at 498, n.6; Petition at 10-11) and the lower court was plainly wrong in basing its decision on these factors.

To the contrary, this Court stated in Austin and Halper that any civil sanction which does not solely serve a remedial purpose is "punishment." Austin, 125 L. Ed. 2d at 498. The circuits are split on how to interpret this admonition, however, and this case presents a clear opportunity for this Court to resolve the conflict.

Here, the largest "civil" MSHA fine in the history of Virginia (JA 299) was assessed against J&T -- a fine

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[2]Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

well in excess of the government's sworn expenses. (Pet. App. 50-51.) Despite the punitive sting of this fine, the prosecution undertook a second proceeding against the defendant arising out of the very same incident and alleged mining violations which were the underpinning of the initial fines. This sort of double punishment is precisely what the Fifth Amendment protects against. This case cries out for further review.

II. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO RESOLVE THE SPLIT AMONG THE CIRCUITS ON THE RECURRING QUESTIONS OF WHETHER, AND TO WHAT EXTENT, FACTUAL DISPUTES MUST BE RESOLVED BY A SENTENCING COURT IN CONNECTION WITH THE IMPOSITION OF CRIMINAL FINES.

In addition to raising vitally important Double Jeopardy issues, this petition also presents a raging split in the circuits concerning whether specific factual findings must be made on controverted factual issues when fines are imposed upon criminal defendants. Petition at 23-25 and n.8.

Ironically, respondent argues that whether J&T had the ability to pay a massive fine is a question too "fact-bound" to merit this Court's consideration. Opp. Pet. at 11. The problem is, factual findings on controverted issues were <u>not</u> made below despite J&T's clear objections to specific factual allegations of the pre-sentencing report. (JA 405-07.) The court's silence flatly contravenes Federal Rule of Criminal Procedure 32(c)(1) and related statutes.

Certainly, the prosecution's suggestion that the district court heard nearly two days of testimony concerning the defendant's ability to pay a fine is misleading. The government offered extensive evidence and arguments that JAD's finances should be considered as relevant in J&T's fines. JAD was not a defendant and JAD had a different ownership make-up than J&T. (JA 277.) Even the government argued to the court that it should pierce the corporate veil to consider JAD's resources. (JA 305, 308-14, 322.) This, however, the trial court specifically refused to do. (JA 329.)

It was inappropriate for the court to consider JAD's resources in calculating J&T's fine[3] -- and if it did so, it was incumbent upon the court to leave some sort of record to permit meaningful appellate review of its rulings. The prosecution's attempt to pass off the trial court's nebulous comments as sufficient to satisfy the requirements of Fed. R. Crim. Proc. 32 cannot withstand scrutiny. Plainly, the court failed to make a specific finding that J&T had the ability to pay a million dollar fine. (Even the Presentence Report stated that J&T did not have the ability to pay on its own. (JA 397 -- under seal.)) At the same time, the court failed to find that J&T and JAD were alter egos. (App. 33.) Even if it had concluded these entities were intertwined, there was no evidence JAD had funds sufficient to cover the massive fine. Again, not even the presentence report suggested that JAD had the ability to pay a

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[3]See Petition at 25-27, Zenith Radio Corp. v. Hazletine, 395 U.S. 100 (1969).

seven-figure fine.[4] The Court of Appeals simply commented that making the requisite findings would have been "cumbersome" (Pet. App. 13) and let the fine stand.

The unfairness of imposing a crippling fine without resolution of relevant, controverted factual issues is as inequitable as it is violative of Rule 32 and related statutes. The split among the circuits on this recurring question merits attention. This case presents the Court with a straight-forward opportunity to provide much needed guidance as to whether, and to what extent, factual disputes must be resolved by a sentencing court in connection with the imposition of criminal fines.

III. THE COURT ERRED IN REFUSING TO GROUP J&T'S OFFENSES UNDER THE SENTENCING GUIDELINES, AND IN ASSESSING AN INAPPROPRIATE INCREASE IN OFFENSE LEVEL GIVEN THE DECISION NOT TO GROUP.

Respondent attempts to gain solace from waiver principles in an effort to sidestep the grouping issue. Noticeably, there is no quarrel from the prosecution in its Opposition Brief that the trial court's calculation error did result in an increase of five levels from a level 14 offense to a level 19 offense, even though a three

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[4]The presentence report suggested only that JAD had sufficient resources to pay the fine recommended in that report, which had a range of $119,000 to $238,000. (JA 398 -- under seal.) The trial court, however, rejected that fine recommendation, imposed a fine of $1.4 million, and never made any determination as to J&T's ability to pay.

level increase to 17 was the maximum increase permissible by the guidelines. Petition at 28-29. Nor does the prosecution dispute that this error literally doubled J&T's fine range. (Pet. App. 81.)[5]

What the prosecution fails to point out is that the pre-sentencing report called for imposition of a level 14 offense. (JA 397 -- under seal.) J&T did not contest this aspect of the pre-sentence report, but certainly did argue that the level should be no higher than 14, consistent with the report. (JA 114-15.) The trial court, nevertheless, disregarded the report's recommendation and imposed a monumentally higher fine than that called for in the report, based on a level 19 offense.

In criminal matters "victory for the government lies in the right decision, not a favorable decision." United States v. Atehortua, 875 F.2d 149, 153 (7th Cir. 1989). Yet here, in many instances, the prosecution does not even suggest that the court acted properly, but seeks to excuse plain error and injustice on the basis of waiver and expediency. The record below reveals that the sentencing process below was flawed at its very core. Review by this Court will help ensure that future fines are meted out in an ordered, judicious manner -- even in cases where fact-finding may prove to be "cumbersome." (Pet. App. 13.)

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[5]It was the prosecution which requested this 5 level increase. (JA 401.)

CONCLUSION

This case presents multiple issues of vital importance on which the circuits are split. The Fourth Circuit's decision below does violence to this Court's Double Jeopardy jurisprudence and should not be permitted to stand. Similarly, the court's holding that the safeguards of Fed. R. Crim. P. 32, and related statutes, may be glossed over when found to be "cumbersome" should be rejected. The decision below establishes dangerous precedents, and involves significant questions, which merit review by this Court.

Respectfully submitted,

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